Supreme Court, U.S.
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No. 06-72

In The

Supreme Court of the United States

HERMAN APPEL,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MARC VAN DER HOUT
Counsel of Record
ZACHARY NIGHTINGALE
BETH FEINBERG
VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE, LLP
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
(415) 981-3000

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QUESTION PRESENTED

Petitioner Herman Appel ("Petitioner"), a lawful permanent resident of the United States for over 25 years, is subject to a final order of removal based solely on a 1992 aggravated felony conviction. This conviction was the result of Petitioner's decision to decline a plea offer and instead exercise his right to a jury trial. The court and agency decisions below all held that Petitioner is statutorily ineligible to apply for relief from removal under former 8 U.S.C. § 1182(c), which was repealed in 1996. The lower court held that, pursuant to this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), as well as other Ninth Circuit decisions, only aliens who entered a plea of guilty or no contest prior to the repeal's enactment remain eligible to apply for that relief. To date, eight circuits have considered this issue, and have reached three conflicting results.

The question presented is whether a lawful permanent resident, who is removable based on a conviction by jury trial sustained after declining a plea offer, and who remained, even after the conviction, statutorily eligible for relief from removal under then-existing 8 U.S.C. § 1182(c), and who now faces removal proceedings initiated after the repeal of that statute, continues to remain eligible for that relief, where he unquestionably would be so eligible had he originally been convicted through a plea?

PARTIES TO THE PROCEEDING

Petitioner (petitioner-appellant below) is Herman Appel. Respondent (respondent-appellee below) is Alberto R. Gonzales, Attorney General of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Herman Appel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals in Petitioner's petition for review (App. 1-5) is unpublished (case number 03-56986). The decision is reported at 146 Fed. Appx. 175 (August 25, 2005). The opinion of the United States District Court for the Central District of California (App. 6-7) is unpublished. The Report and Recommendation of United States Magistrate Judge (App. 8-21) is unpublished. The opinion of the Court of Appeals in Petitioner's prior petition for review (App. 22-24) is unpublished (case number 99-70211). The decision is reported at 4 Fed. Appx. 425 (February 20, 2001). The opinions of the Board of Immigration Appeals (App. 25-28) and the Immigration Judge are also unpublished. The opinion of the Ninth Circuit Court of Appeals in Petitioner's petition for panel rehearing (App. 29) is unpublished (case number 03-56986).

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2005. Rehearing was denied on April 17, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition (App. 30-45) are pertinent provisions of the Fifth Amendment to the United States Constitution; the Fourteenth Amendment to the United States Constitution; Section 1182(c) of Title 8, United States Code, as in effect before April 24, 1996; Section 1182(c) of Title 8, United States Code, as amended effective April 24, 1996; Section 1229b(a) of Title 8, United States Code, as in effect beginning April 1, 1997; Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996); Sections 304(b) and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996); Section 212.3(b) of Title 8, Code of Federal Regulations, as in effect from 1992 through 1996; and Section 2933(a) of the California Penal Code.

STATEMENT

A. Introduction

In 2001, this Court issued its decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), in which it resolved the then-existing circuit split and held that lawful permanent residents who accepted plea agreements, and were thereby convicted of deportable offenses, prior to the 1996 amendments to, and repeal of, 8 U.S.C. § 1182(c); Immigration and Nationality Act (hereinafter "INA") § 212(c) (known as

"§ 212(c) relief"),[1] remain eligible to apply for relief from removal under former INA § 212(c). In that decision, the Court did not address whether the repeal of § 212(c) relief applies to other alien criminal defendants who were outside the *St. Cyr* class – those who were convicted after exercising their right to a jury trial (or a bench trial) – instead, leaving that determination for another day. Since *St. Cyr* was decided, eight circuits have applied its holding to aliens who were convicted after exercising their right to a jury trial, and have reached three conflicting results. This circuit split is irreconcilable and again clearly requires this Court's intervention.

Moreover, the lower court's decision finding Petitioner ineligible to apply for § 212(c) relief violates his right to Equal Protection and creates an irrational result in that it affords discretionary relief from removal under former INA § 212(c) to lawful permanent residents who were faced with the decision as to whether to plead guilty or go to jury trial and who chose to plead guilty, while denying eligibility for relief under former INA § 212(c) to that same group of people when they chose to go to jury (or bench) trial.

As approximately 55,000 convictions are obtained through jury trials each year,[2] a very significant number of

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[1] The relevant amendments to former INA § 212(c) were contained in Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (hereinafter "AEDPA"). The repeal of INA § 212(c) was contained in Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (hereinafter "IIRIRA").

[2] *See Compendium of Federal Justice Statistics, 2002*, Bureau of Justice Statistics, United States Department of Justice (September

(Continued on following page)

cases would be potentially impacted by resolution of this issue. This is a profoundly important issue that affects countless lawful permanent residents in the United States – as well as their United States citizen families, friends, and communities – who are seeking relief from removal. Therefore, the instant case warrants this Court's review.

B. Statutory Background

1. Pre-AEDPA Law

Prior to the enactment of AEDPA, lawful permanent residents who were deportable due to most criminal convictions, including trafficking and other controlled substances offenses, could apply for discretionary relief if they had seven consecutive years of residency and if they had not served a term of imprisonment of five years or more for aggravated felony convictions.[3] 8 U.S.C. § 1182(c) (1994). These applications were adjudicated by Immigration Judges and historically, over half of all such applications were granted, usually with a showing of rehabilitation and/or other equities. *See St. Cyr*, 533 U.S. at 296 n.5.

2004); *State Court Sentencing of Convicted Felons, 2002*, Bureau of Justice Statistics, United States Department of Justice (May 2005). As state misdemeanor convictions are excluded from these statistics, the actual number is likely higher.

[3] Although the statutory language only explicitly extended eligibility for § 212(c) relief to lawful permanent residents who traveled abroad and were seeking readmission, it is well-established by agency interpretation that this relief was also available to lawful permanent residents in deportation proceedings who had not left the country. *See Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976); *see also Francis v. INS*, 532 F.2d 268, 273 (2nd Cir. 1976); *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981).

2. AEDPA

Congress enacted AEDPA on April 24, 1996, which rendered aliens with certain classes of criminal convictions, including aggravated felonies, statutorily ineligible for § 212(c) relief. *See* AEDPA § 440(d). Soon thereafter, the Board of Immigration Appeals ("BIA" or "Board") held that AEDPA § 440(d)'s bar did not apply retroactively to § 212(c) applications of relief that were pending on AEDPA's date of enactment. *Matter of Soriano*, 21 I. & N. Dec. 516 (BIA 1996). The Attorney General subsequently reversed the BIA's decision, finding that AEDPA § 440(d) applied to all pending deportation proceedings, regardless of when the alien filed the application for § 212(c) relief. *Matter of Soriano*, 21 I. & N. Dec. 516 (AG 1997).

Further judicial review of this amendment was subsumed in the review of the next significant change to the relevant law, which quickly followed.

3. IIRIRA

On September 30, 1996, Congress enacted IIRIRA, which went into effect on April 1, 1997, and which eliminated § 212(c) relief entirely. *See* IIRIRA § 304(b). In its place, Congress established a new form of discretionary relief called "cancellation of removal," but created a statutory bar to this relief for aliens who have aggravated felony convictions. 8 U.S.C. § 1229b(a).

In *St. Cyr*, this Court found that the amendments to, and repeal of, § 212(c) did not eliminate eligibility for relief for those who were convicted by plea at a time when they were eligible for that relief. *See St. Cyr*, 533 U.S. at 326. This clarified a Circuit split on this question, but did not

reach the more general question of whether § 212(c) relief is still available to persons who were convicted by other means, including jury trials. The Circuits remain irreconcilably split over this more general question.

C. Statement of Facts

Petitioner Herman Appel ("Petitioner") is a citizen and national of Austria. A.R. at 504.[4] The son of Jewish Holocaust survivors, he has been a lawful permanent resident of the United States since 1979. A.R. at 211, 504. His wife, Esther, and his two children, Morris, age 33, and Natalie, age 16, are all United States citizens. A.R. at 84. Petitioner owns a business, A La Carte Catering, that has assets of over one million dollars and that employs approximately 20 people full-time and approximately 40 independent contractors. A.R. at 310-403.

Petitioner was arraigned in Los Angeles Superior Court and charged with violating California Health & Safety Code ("Cal. H. & S.") sections 11351 and 11352(a) and California Penal Code ("Cal. P.C.") section 182[1]. A.R. at 187. On May 20, 1992, the prosecuting attorney made a plea offer to Petitioner in open court of a seven year sentence. App. 48. Petitioner rejected that offer, and the judge announced that the case would be set for trial. App. 48-49. On June 19, 1992, Petitioner was convicted by jury trial for violating Cal. H. & S. §§ 11351 and 11352(a), for which he received a sentence of eight years in prison. A.R. at 176. He was released in 1997, after serving less than

[4] A.R. refers to the Certified Administrative Record that was submitted to the Ninth Circuit for *Appel v. INS*, case number 99-70211.

five years in prison (due to his credit for good behavior). A.R. at 506-07.

D. Procedural History

On October 14, 1997, Petitioner was served with a Notice to Appear, charging him as removable under 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who had been convicted of an aggravated felony, and 8 U.S.C. § 1227(a)(2)(B)(i), as an alien who had been convicted of a controlled substance offense. A.R. at 504. Petitioner's removal hearing was held on five dates between October 24, 1997 and March 10, 1998. A.R. at 82-174. At his hearing he applied for relief from removal pursuant to, *inter alia*, INA § 212(c). A.R. at 104. On March 10, 1998, the Immigration Judge denied Petitioner's application for § 212(c) relief, holding that he was statutorily ineligible due to AEDPA's aggravated felony bar to § 212(c) and IIRIRA's subsequent repeal of that statute. A.R. at 71-80. On February 19, 1999, the BIA affirmed the Immigration Judge's decision, holding that "[s]ince he is in removal proceedings, a waiver of inadmissibility under section 212(c) is not a form of relief that is available." App. 27 (citing IIRIRA § 304(b)).

On March 1, 1999, Petitioner filed a petition for review with the U.S. Court of Appeals for the Ninth Circuit of the BIA's decision. On February 20, 2001, the court denied Petitioner's petition for review, holding that IIRIRA removed its jurisdiction to consider petitions for review on direct appeal, and informing Petitioner that he could file a petition for writ of habeas corpus in the district court. App. 22-24. On September 30, 2002, the mandate

issued, after the court had held issuance of the mandate in abeyance pending this Court's decision in *INS v. St. Cyr*.

On April 3, 2003, Petitioner filed a petition for writ of habeas corpus with the United States District Court for the Central District of California, arguing, *inter alia*, that the BIA erred in finding him statutorily ineligible for § 212(c) relief. On August 28, 2003, a magistrate judge issued a Report and Recommendation that the petition be dismissed on the grounds that, *inter alia*, Petitioner's 1992 conviction rendered him ineligible for § 212(c) relief. App. 8-21. On October 6, 2003, the district court adopted the magistrate judge's Report and Recommendation and dismissed Petitioner's habeas petition with prejudice. App. 6-7.

On November 7, 2003, Petitioner filed a Notice of Appeal of the district court's decision with the U.S. Court of Appeals for the Ninth Circuit. On August 25, 2005, the court of appeals filed a memorandum order and judgment affirming the district court's denial of Petitioner's petition for writ of habeas corpus. App. 1-5. The court held, *inter alia*, that Petitioner was ineligible to apply for § 212(c) relief because his conviction occurred prior to AEDPA and IIRIRA, and because he was convicted by jury trial, rather than pursuant to a plea agreement. App. 1-4. In its decision, the court did not engage in a substantive retroactivity analysis, instead citing to *St. Cyr* and a string of Ninth Circuit cases that the court relied on to support its holding.

On October 6, 2005, Petitioner filed a Petition for Panel Rehearing before the court of appeals. On April 17, 2006, the court denied Petitioner's Petition for Panel Rehearing. App. 29.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit Has Decided the Important Issue of Whether Aliens Who Were Convicted by Jury Trial Pre-AEDPA and Pre-IIRIRA Remain Eligible for § 212(c) Relief in a Way that Conflicts with this Court's Decisions in *Landgraf v. USI Film Products*, *Hughes Aircraft Company v. U.S. ex rel. Schumer*, and *INS v. St. Cyr*, and Which Is in Direct Conflict with Two Other Circuits

The Ninth Circuit's ruling in Petitioner's case runs counter to this Court's retroactivity analysis, as established by *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and as applied in *Hughes Aircraft Company v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997) and *St. Cyr*, *supra*, and is in direct conflict with the Third Circuit's ruling in *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004) and the Second Circuit's ruling in *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004). The lower court's erroneous application of this Court's retroactivity analysis to a matter of enormous national importance, and the irreconcilable conflict among the circuits on this issue, warrants this Court's review. As eight circuits, including those with the largest immigrant populations, have addressed the issue, this fundamental split now calls for uniform resolution, just as was required when this Court decided the issues in *St. Cyr*.

This Court has made clear that the retroactive application of newly enacted legislation is presumptively impermissible when it adds new penalties to prior conduct in the absence of an express command by Congress. *See Landgraf*, 511 U.S. at 280. In *Landgraf*, the Court established a two-prong test for determining whether application of a new statute to prior conduct has an impermissibly

retroactive effect. *Id.* Under the first prong, the court must determine whether Congress "has expressly prescribed the statute's proper reach." *Id.* If Congress has, the inquiry is over and the court must apply the statute according to Congress' intent. *Id.* However, if Congress' intent is ambiguous, the court must determine whether the statute "would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* "The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf*, 511 U.S. at 270). If the court determines that the statute has retroactive effect, then it must abide by the traditional presumption that Congress did not intend it to apply to prior conduct. *Landgraf*, 511 U.S. at 280. This presumption against retroactivity is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265. *See also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law.").

In *Landgraf*, the petitioner (Landgraf) sued the respondent (USI Film Products) for sexual harassment that allegedly took place between September 1984 and January 1986. *Id.* at 247-48. Subsequent to the alleged harassment, Congress passed the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a), which changed the law to allow plaintiffs in sexual harassment suits to have jury trials under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as expanded the availability of

monetary relief in sexual harassment cases. *Id.* at 250-54. Despite the pre-existence of sanctions that prohibited sexual harassment, the Court found that the new law could not be applied to add a further penalty to conduct that occurred prior to the law's enactment. *Id.* at 286. The Court noted that "[e]ven when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Id.* at 264 n.35.

In *Hughes Aircraft*, this Court applied the *Landgraf* retroactivity test and held that the new legislation at issue was impermissibly retroactive as applied to conduct that pre-dated its enactment. 520 U.S. at 951-52. There, the Court found that it was impermissibly retroactive to apply a 1986 amendment to the False Claims Act, 31 U.S.C. § 3730(b), in a case where the underlying wrongful conduct occurred prior to the amendment's enactment. *Id.* at 943-44. Importantly, in holding that the amendment impermissibly attached a new legal disability to already-completed conduct, the Court never even considered whether there was any detrimental reliance on the law at the time of the relevant conduct. *Id.* at 951-52. Instead, the Court concluded that "the legal effect of the 1986 amendment would be to deprive Hughes of [a] defense," which, in the absence of express Congressional intent, required applying the Court's traditional presumption against retroactivity to that case. *Id.*

Moreover, in *St. Cyr*, the Court employed the *Landgraf* analysis to hold that it was impermissibly retroactive to apply IIRIRA's repeal of § 212(c) to aliens who entered into plea agreements prior to IIRIRA's enactment. 533 U.S. at 326. Under the first prong of the *Landgraf* analysis, the Court determined that Congress did not state with

the requisite clarity whether it intended the repeal of § 212(c) relief to apply retroactively. *Id.* at 319-20. The Court therefore found that it was necessary to proceed to the second prong of the analysis to consider whether the new law is impermissibly retroactive *as applied* to the facts of that case (namely a conviction through plea). *Id.* Thus, the only issue that remains open – and that is in conflict among the circuit courts – is whether, under *Landgraf's* second prong, IIRIRA's repeal of § 212(c) is impermissibly retroactive as applied to aliens, such as Petitioner, who sustained criminal convictions after rejecting a plea offer and proceeding to jury trial, at a time when they would have been eligible for § 212(c) relief whether convicted or not.

1. This Court Has Never Required a Showing of Actual Reliance in Order to Find Impermissible Retroactive Effect

The First, Fourth, Fifth, Seventh, Ninth and Eleventh Circuits have all grossly misinterpreted the *Landgraf* analysis by holding that it is not impermissibly retroactive to apply § 212(c)'s repeal to aliens who were convicted by any means other than a plea agreement (i.e., by jury trial) because *St. Cyr's* holding was limited to aliens who were convicted as the result of a plea, and because other aliens allegedly could not show detrimental reliance on the law at the time of their conviction. *See Dias v. INS*, 311 F.3d 456 (1st Cir. 2002); *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006); *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002). As the Third Circuit pointed out, however, this

reasoning is severely flawed and is squarely at odds with this Court's retroactivity analysis. *See Ponnapula*, 373 F.3d at 501.

At no time has this Court ever held that reliance is necessary in order to show that application of a new law to prior conduct has an impermissible retroactive effect. *See, e.g., Landgraf*, 511 U.S. at 280; *Hughes Aircraft*, 520 U.S. at 948. Although reliance on settled expectations may provide guidance for a court in considering the retroactivity of a new law, it is but one of a number of factors used to determine whether the law may be applied to past conduct. *See Landgraf*, 511 U.S. at 270 ("The judgment whether a particular statute acts retroactively should be *informed and guided* by familiar considerations of fair notice, reasonable reliance, and settled expectations.") (emphasis added). Regardless of reliance, the presumption against retroactivity reflects the broader and more fundamental concern that people "should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 265; *see also Hughes Aircraft*, 520 U.S. at 947 (finding impermissible retroactivity without even mentioning reliance). As the Third Circuit has correctly noted, "[t]he Supreme Court has never required actual reliance or evidence thereof in the Landgraf line of cases, and has in fact assiduously eschewed an actual reliance requirement." *Ponnapula*, 373 F.3d at 491.

Likewise, this Court in *St. Cyr* did not impose a reliance requirement onto the second prong of the *Landgraf* analysis in holding that it is reasonable to presume that the narrow class of aliens at issue in that case – those who entered into plea agreements – detrimentally relied on the law at the time of their pleas, and that it is therefore impermissibly retroactive to apply the change in law

to their pre-enactment conduct (the conviction by plea agreement). *See* 533 U.S. at 322-23. The Court never even limited its holding to aliens whose plea agreements preserved their statutory eligibility for § 212(c) relief – i.e., pleas that would have resulted in a term of five years or less in prison. *Id.* at 326.

Moreover, based on the factual scenario presented in *St. Cyr*, it was simply outside the Court's scope to consider the corollary question of whether individuals who, like Petitioner, declined plea offers and instead exercised their right to a jury trial, could be statutorily barred from applying for § 212(c) relief, regardless of whether they could show detrimental reliance on the law at the time of their convictions. The Court framed its analysis under the second prong of the *Landgraf* analysis by quoting Justice Story's seminal teaching that "[a] statute has retroactive effect when it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, *or attaches a new disability*, in respect to transactions or considerations already past.'" 533 U.S. at 322 (emphasis added) (quoting *Society for Propagation of the Gospel v. Wheeler*, 2 Gall. 105, 22 F. Cas. 756, 767, F. Cas. No. 13156 (No. 13, 156) (CCNH 1814) (Story, J.)). However, the Court then explicitly made clear that the parameters established by Justice Story do "not purport to define the outer limit of impermissible retroactivity. . . . Instead, it simply describes several '*sufficient*,' as opposed to '*necessary*,' conditions for finding retroactivity." *Id.* at 322 n.46 (quoting *Hughes Aircraft*, 520 U.S. at 947) (emphasis in original).

The Court in *St. Cyr* thus made it explicitly clear that what has so far been established are a number of *sufficient*

circumstances for finding impermissible retroactivity, but not any bright line rule. However, despite this teaching, the lower court, as well as a number of other circuits, have erroneously imposed a bright line reliance rule onto the retroactivity analysis that has never been announced – and, in fact, has been clearly shunned – by this Court. In no way, then, did *St. Cyr* eviscerate this Court's well-established *Landgraf* test which continues not to require detrimental reliance in order to show impermissible retroactivity. *See Olatunji v. Ashcroft*, 387 F.3d 383, 393 (4th Cir. 2004) ("*St. Cyr* did not alter the requirements for establishing retroactivity. . . . *St. Cyr* did not purport to add a subjective reliance requirement; rather it applied *Landgraf* to a [particular] set of facts. . . ."). The First, Fourth, Fifth, Seventh Ninth and Eleventh Circuits have thus all wrongly imposed a reliance requirement onto the *Landgraf* analysis, which can only be corrected through this Court's review.

2. Although Not Required Under the Retroactivity Analysis, It Is as Reasonable to Presume that Aliens Relied on the State of Immigration Law in *Rejecting* Plea Agreements and Proceeding to Trial as They Did in *Accepting* Plea Agreements

As discussed above, the majority of circuits to consider this issue have all erroneously concluded that it is *only* reasonable to assume that aliens rely on the availability of immigration relief in opting to *accept* a plea agreement, but not in opting to *reject* a plea agreement and proceed to trial. This is illogical. As the Ninth Circuit has itself stated: "That an alien charged with a crime . . . would factor the immigration consequences of conviction in

deciding *whether to plead or proceed to trial* is well-documented." *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) (emphasis added) (quoted with approval in *St. Cyr*, 533 U.S. at 322). Despite the clear logic of applying the same reasoning to both sides of the same coin (i.e., the decision as to whether to accept a plea or not accept a plea), only the Third Circuit has reached this conclusion. *See Ponnapula*, 373 F.3d at 501.

From the moment of arraignment until the moment of conviction, alien defendants are constantly making strategic decisions, all of which presumably entail factoring in immigration consequences, just as this Court found in the decision to enter into a plea agreement. *See St. Cyr*, 533 U.S. at 322 ("There can be little doubt that, as a general matter, alien defendants considering *whether* to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.") (emphasis added); *id.* at 322 n.48 ("[T]he American Bar Association's Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel should fully advise the defendant of these consequences.") (internal quotations omitted). The immigration advisals that this Court found that alien defendants presumably receive from their criminal defense attorneys concern the immigration consequences of all possible decisions that the defendant must consider – including, for example, whether to accept a plea, whether to make a counter-offer to a plea, whether to turn down a plea in hopes of receiving a better plea offer at a later time, or whether to proceed to jury trial. It is simple commonsense that if there is reliance on immigration advice in making any one of those decisions, there must be reliance in making the converse decision (i.e., to reject, rather than accept, a plea offer).

In *Ponnapula*, the Third Circuit correctly extended this Court's holding in *St. Cyr* to aliens who turned down plea offers and went to trial prior to the enactment of AEDPA and IIRIRA. 373 F.3d at 496. The court held that the same reasonable reliance that the *St. Cyr* aliens had on immigration law at the time of their pleas was also present for aliens who turned down plea agreements and proceeded to trial. *Id.* As the court explained:

> [I]f it was reasonable in *St. Cyr* for an alien to rely on the attenuated availability of § 212(c) relief in *accepting* a plea agreement, we see no reason why it would be unreasonable for the same alien to likewise rely in *declining* a plea agreement. The reasonable reliance question turns on the nature of the statutory right, not on the particular choice actually made.

Id. (emphasis in original). However, as the court noted, all other circuit courts to consider this issue have reached a different conclusion and, in so doing, have effectively established a presumption in *favor* of the retroactive application of new laws, which runs directly counter to the line of authority established by this Court. *Id.* at 491. The court also faulted the majority of other circuits for injecting a *quid pro quo* requirement into the retroactivity analysis, although such a requirement was never established by *St. Cyr* or other retroactivity cases that have been decided by this Court.[5] *Id.* at 499 ("An individual can

[5] Defendants who reject plea offers do give up such considerations as the certainty of a known resolution to the case, the possibility of a shorter sentence than would be imposed after trial, and the ability to avoid the significant cost – financial and emotional – of a trial. *See Ponnapula*, 373 F.3d at 495 ("There are many reasons to proceed to trial – the lack of a plea agreement that would ensure eligibility for § 212(c)

(Continued on following page)

rely or have settled expectations about a state of affairs without having to enter into an exchange to secure or assure it.").

The lower court's decision in Petitioner's case should have followed the same reasoning as the Third Circuit's decision in Ponnapula's case. Petitioner presumably had the same reliance interest in turning down a plea agreement and proceeding to trial as the petitioner in *Ponnapula* and the aliens in *St. Cyr* – reasonable reliance on the state of immigration law at the time he opted to turn down a guilty plea and proceed to jury trial.[6] In fact, on May 20, 1992, Petitioner received an offer in open court of seven years in prison which, under California state law, would have meant that he would only serve half that time[7] – or approximately three years and six months – with credit for good time served. App. 48. Petitioner turned down that offer, and opted instead to exercise his right to a trial. *Id.* He was ultimately sentenced to eight years in prison, which is scarcely more time than the seven years that he was offered by the District Attorney. *Id.*; *see also* A.R. at 176. It is certainly as reasonable here as with the *St. Cyr* alien defendants to assume that Petitioner's decision to turn down that plea was based, *inter alia*, on the consideration that he would most likely receive roughly the same sentence if convicted by a jury as if he

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relief, the hope of an acquittal, or the simple desire to exercise fundamental constitutional rights – but few if any of them are inconsistent with preserving a contingent interest in § 212(c) relief.").

[6] Given that most criminal cases are resolved by pleas, but that not all plea offers are accepted, it is logical that a good number of trials will in fact be preceded by plea offers which are declined.

[7] *See* California Penal Code Section 2933(a).

accepted the plea offer, and that the immigration consequences of choosing either path would be the same – that he would remain statutorily eligible for § 212(c) relief. *See Ponnapula*, 373 F.3d at 500 ("While Ponnapula may have 'rolled the dice' in terms of guilt or innocence at trial, he did not do so with respect to immigration consequences in view of his reasonable expectation that there would be no adverse immigration consequences of going to trial."). Thus, the lower court misapplied the holding in *St. Cyr*, and the vast majority of circuits likely to reach this issue have already done so, creating a severe circuit split over whether, and to what extent, reliance is required in order to find that a new law has an impermissible retroactive effect on prior conduct. Hence, this Court's review of this issue is warranted.

3. It Is Also Reasonable to Presume that Aliens Relied on the State of Immigration Law in Choosing Not to Affirmatively Apply for § 212(c) Relief

Another fatal flaw in the lower court's reasoning, as well as that of the First, Fourth, Fifth, Seventh and Eleventh Circuits, is its premise that there is only *one* point in criminal proceedings at which the relevant underlying conduct can be found for purposes of the retroactivity analysis – the decision to enter into a plea agreement and forego a jury trial. As *Landgraf* makes clear, however, the relevant underlying conduct in the retroactivity analysis is any conduct to which new legal consequences attach after that conduct has already been completed. 511 U.S. at 282. In *Landgraf*, "the event to which the new damages provision relates is the discriminatory conduct of respondents' agent John Williams; if applied here, that provision would

attach an important new legal burden to that conduct." *Id.* Under the facts of *St. Cyr*, that relevant underlying conduct was a decision to enter into a plea agreement. 533 U.S. at 322. In *Hughes Aircraft*, the Court held that the new law was impermissibly retroactive based on either of two acts in which relevant underlying conduct could be found for purposes of the analysis. 520 U.S. at 951 (holding that the new law could not be retroactively applied "whether we consider the relevant conduct to be Hughes' disclosure to the Government or its submission of the allegedly false claim."). Clearly, then, the relevant conduct for purposes of the retroactivity analysis may be found at any number of different points, and this determination requires individualized consideration of each case. In Petitioner's case, in addition to finding the relevant conduct to be his decision to proceed to trial, it may also be his decision to forego affirmatively applying for § 212(c) relief between the time of his conviction and the date of the enactment of the new law that rendered him suddenly ineligible for that relief.

This is precisely the holding of the Second Circuit, which stands alone in this analysis, but which has accurately applied the *Landgraf* retroactivity analysis to conduct that had not previously been examined by any of the circuit courts. In *Restrepo v. McElroy*, 369 F.3d 627, 630 (2d Cir. 2004), the Second Circuit addressed the case of an alien who was convicted by a jury trial of conspiracy to distribute cocaine prior to the enactment of AEDPA. In that case, the court held that application of AEDPA's § 212(c) bar to the petitioner was impermissibly retroactive because, at the time of his conviction, the petitioner was able to affirmatively apply for § 212(c) relief prior to being placed into deportation proceedings. 369 F.3d at 632-33.

See also 8 C.F.R. § 212.3(b) (1992). The court reasoned that the decision to forego applying for § 212(c) relief at that time was based on the belief that he could apply if necessary in the future when, "presumably, his 212(c) case would be stronger due to a longer record of rehabilitation and community ties." *Restrepo*, 369 F.3d at 633. The court found that the elimination of § 212(c) relief to individuals who could have affirmatively chosen to apply for § 212(c) but chose not to do so in order to wait until they had stronger cases was a violation of fundamental fairness. *Id.* at 634. As the court stated:

> Just like the aliens in *St. Cyr*, who sacrificed something of value – their right to a jury trial, at which they could obtain outright acquittal – in the expectation that their guilty pleas would leave them eligible for 212(c) relief, an alien like Petitioner also sacrificed something – the shot at obtaining 212(c) relief by immediately filing an application – in order to increase his chances of obtaining such relief later on.

Id. at 634-35. This presents yet another example of the reasonable reliance that must be considered under the authority of *Landgraf* and its progeny.

Similar to the alien in *Restrepo*, Petitioner could have applied for § 212(c) relief to waive inadmissibility immediately after his conviction in 1992, but it is reasonable to presume did he not so apply in reliance on his ability to gain greater equities and demonstrate his rehabilitation upon his release from prison. From the time of his conviction up until the change in law four years later, the regulations provided him with the opportunity to affirmatively apply for an advance waiver of inadmissibility pursuant to § 212(c). *See* 8 C.F.R. § 212.3(b) (1992) ("The application

[for § 212(c) relief] may be filed *prior to*, at the time of, or at any time after the applicant's departure from or arrival into the United States.") (emphasis added). Petitioner's decision to forego affirmatively applying for § 212(c) relief from inadmissibility is thus in all respects the same decision that the alien made in *Restrepo* and, as the Second Circuit held, implicates the same reasonable reliance concerns as the aliens in *St. Cyr*. Thus, it warrants this Court's attention to resolve the conflict among the circuits regarding whether there are circumstances other than that announced in *St. Cyr* in which aliens who were convicted of deportable offenses prior to AEDPA and IIRIRA's amendments to INA § 212(c) should remain eligible to apply for § 212(c) relief. The Court should now resolve these questions left open by the *St. Cyr* decision, as the circuit courts have not uniformly applied Supreme Court precedent.

B. The Ninth Circuit's Decision Violates Equal Protection and Creates an Irrational Result for those Presented with the Option of Entering a Guilty Plea or Going to Trial in that it Affords Discretionary Relief from Removal Under Former INA § 212(c) to Aliens Who Chose to Enter a Plea, While Denying Eligibility for that Relief to Similarly Situated Aliens Who, When Faced With the Same Decision, Opted to Reject a Plea Offer and Proceed to Jury Trial

Petitioner's case also warrants this Court's review because the lower court's decision creates an irrational result that violates Petitioner's right to Equal Protection. It is well-established that the Equal Protection clause, as contained in the Fourteenth Amendment and applied to the federal government through the Due Process Clause of

the Fifth Amendment, applies to aliens. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Matthews v. Diaz*, 426 U.S. 67, 79 (1975); *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (discussing the court's "frequently expressed concern to avoid disparate treatment of similarly situated aliens under the immigration laws."). Under the Equal Protection Clause, the government must have a rational basis in order to treat similarly situated persons in a different manner. *See, e.g., Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (classifications of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."). Here, there was no rational basis for the government's denial of Petitioner's application for § 212(c) relief, and the lower court erred in affirming the government's Equal Protection violation.

The Ninth Circuit's decision, as well as that of all other circuits to consider the § 212(c) eligibility issue except for the Third Circuit, as discussed *supra*, creates an irrational distinction between two similarly situated groups of aliens. The first group is those aliens who reached a point in their criminal proceedings where they were faced with the decision as to whether to accept a plea offer or proceed to jury or bench trial, presumably received immigration advice in making this decision, and who, in reasonable reliance on that advice, decided to accept a plea offer and were convicted prior to the enactment of AEDPA/IIRIRA. The second group is those aliens who reached the same point in their criminal proceedings where they were faced with the decision as to whether to accept a plea offer or proceed to jury or bench trial, presumably received immigration advice in making this decision, and

who, in reasonable reliance on that advice, decided to proceed to jury trial and were convicted prior to the enactment of AEDPA/IIRIRA. These two groups are in exactly the same position up until that final strategic decision, and there is no rational basis to treat them differently based on that decision. Both groups remained eligible for § 212(c) relief after their convictions, and only later would face losing that eligibility upon the amendments to, and repeal of, § 212(c). It is thus irrational and violates Equal Protection to create a bright line rule that allows only that first group to apply for § 212(c) relief, while rendering that second group *per se* ineligible to apply for the same relief.

In addition, contrary to its holding in the instant case, the lower court has reversed such irrational classifications with regard to § 212(c) eligibility in other Equal Protection cases. In *Tapia-Acuna v. INS*, for example, the court held that granting § 212(c) relief to aliens in exclusion proceedings who had temporarily proceeded abroad, but denying that relief to aliens in deportation proceedings who had never left the country, violated Equal Protection. 640 F.2d 223, 225 (9th Cir. 1981). *See also Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) (same). Similarly, in *Servin-Espinoza v. Ashcroft*, the court held that it violated Equal Protection to deny an alien with an aggravated felony conviction eligibility to apply for § 212(c) relief under AEDPA § 440(d) because he was in deportation proceedings, even though (under the law in effect at the time of his proceedings) he would have been eligible to apply for § 212(c) relief had he been in exclusion proceedings. 309 F.3d 1193, 1198-99 (9th Cir. 2002).

More recently, the Ninth Circuit held that it violated Equal Protection to extend eligibility for § 212(c) relief to

aliens whose offenses were grounds for deportation at the time of their convictions, while denying eligibility to those aliens whose offenses were not deportable at the time of their conviction, but that were subsequently rendered deportable due to a change in law. *See Cordes v. Gonzales*, 421 F.3d 889, 898-99 (9th Cir. 2005). The court reasoned that the disparate treatment of these two classes of aliens yielded an irrational result because aliens who were convicted of more serious offenses were more likely to remain eligible for § 212(c) relief than those aliens whose offenses were less serious and, therefore, were not deemed deportable at the time of conviction. *Id.* at 898.

Likewise, the disparate treatment between aliens who accepted guilty pleas and aliens who rejected guilty plea offers creates a similar irrational result. Under the scheme imposed by the First, Fourth, Fifth, Seventh, Ninth and Eleventh Circuits, aliens who claim factual innocence – and therefore presumably would be more inclined to seek to prove that innocence at a jury trial – are more likely to be denied eligibility for § 212(c) relief than those aliens who do not dispute their guilt as a matter of fact – and who accordingly are more likely inclined to enter guilty pleas – and who would thereby remain eligible to waive their removal under § 212(c). As the lower court held in *Cordes*, this creates the irrational result of rewarding criminal behavior while creating strong disincentives for those who are factually innocent and accordingly want to prove that innocence by proceeding to trial.[8] There is no

[8] Similarly, it is irrational to distinguish those convicted by plea from those convicted by bench trial, given that significant rights are given up in both situations, and thus the retroactive effect of the repeal of § 212(c) relief applies equally. Likewise, it would be irrational to distinguish those convicted by a bench trial from those convicted by a jury trial for similar reasons, as both are exercising their rights to a

(Continued on following page)

rational basis to support this disparate treatment and, therefore, it cannot be sustained.

* * *

Thus, because the Ninth Circuit issued a decision that is squarely at odds with this Court's decisions in *Landgraf*, *Hughes Aircraft* and *St. Cyr*, because there is an irreconcilable conflict among the circuits on this matter of profound importance, and because the Ninth Circuit and other lower courts that have applied the same analysis reached a conclusion that is in violation of Equal Protection, review by this Court is warranted.

CONCLUSION

For all of the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

MARC VAN DER HOUT
Counsel of Record
ZACHARY NIGHTINGALE
BETH FEINBERG
VAN DER HOUT, BRIGAGLIANO
& NIGHTINGALE, LLP
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
(415) 981-3000

July 14, 2006

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trial and could expect similar results. Therefore, there should be no distinction between a conviction by plea and one by trial (of any kind).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERMAN APPEL, Petitioner-Appellant, v. ALBERTO R. GONZALES, Attorney General, Respondent-Appellee.	No. 03-56986 D.C. No. CV-03-2259-DOC MEMORANDUM* (Filed Aug. 25, 2005)

Appeal from The United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted July 12, 2005
Pasadena, California

Before: FARRIS, D.W. NELSON, and TALLMAN, Circuit Judges.

Petitioner Herman Appel appeals the district court's denial of his petition for a writ of habeas corpus. He argues he should be eligible to file an application for waiver of deportation pursuant to the now-repealed § 212(c) of the Immigration and Nationality Act, and that denial of his application pursuant to the 1996 amendments to that Act, which barred § 212(c) relief, *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 204(B), 110 Stat. 3009-546 (repealing INA § 212(c)),

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

constitutes impermissible retroactivity. He is not so entitled, and the application of the INA amendments were not impermissibly retroactively applied to him. His petition is denied.

This Court has jurisdiction to review the questions in this habeas petition pursuant to § 242(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252, and § 106(c) of the REAL ID Act of 2005, Pub. L. No. 109-13, § 106, 119 Stat. 231, 310-11 (May 11, 2005). Section 106(c) directs district courts in which 28 U.S.C. § 2241 habeas petitions were pending on May 11 to transfer those cases to the appropriate courts of appeals, which are then to review them as if they had been brought as direct appeals pursuant to INA § 242(b)(2), as amended by the REAL ID Act. The Section does not on its face apply to petitions pending before the courts of appeals, but we have previously held that such petitions should be treated as timely filed petitions for direct review. *Alvarez-Barajas v. Gonzales,* No. 04-55733, 2005 WL 1906672, at *2-3 (9th Cir. Aug. 11, 2005).

Appel's argument can be interpreted either as an argument that the INS's decision to delay commencing deportation proceedings violated his rights (perhaps to due process), or that the Illegal Immigration Reform and Immigrant Responsibility Act's bar to 212(c) waiver relief may not be applied retroactively to him because such relief was available to him when he was convicted. If interpreted as an argument of delay violating his rights, Appel's argument is unavailing, regardless of whether he has sufficiently raised it. In the first instance, this Court has no jurisdiction to review any naked non-constitutional claim that there was error in the decision to delay removal

proceedings until 1997. 8 U.S.C. § 1252(g); *Jimenez-Angeles v. Ashcroft,* 291 F.3d 594, 598-99 (9th Cir. 2002).[1] This Court retains jurisdiction, though, to review the "purely legal" question of the infringement of Appel's rights to due process inherent in that delay. *Id.* Unfortunately for Appel, he can identify no liberty or property interest implicated by the delay, and due process guarantees apply only when such an interest is at stake. *Board of Regents v. Roth,* 408 U.S. 564, 569 (1972). It cannot be that Appel had a "liberty" interest in having removal proceedings brought against him, and he cannot claim a vested interest in any pre-removal "right" to apply for a 212(c) waiver, since such a right would only vest at the commencement of removal proceedings.

More directly, Appel argues that under the analysis outlined in *Landgraf v. USI Film Products,* 511 U.S. 244 (1994), and followed in *I.N.S. v. St. Cyr,* 533 U.S. 289 (2001), the application of the IIRIRA's 212(c) prohibition is impermissible.[2] It is not.

Appel was convicted by jury of the crimes leading to his removal proceedings. As this Court had determined before *St. Cyr,* and has reiterated thereafter, petitioners in Appel's position are not entitled to relief from the application of the AEDPA/IIRIRA prohibitions on § 212(c) waivers. *See*

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[1] Section 1252(g), which bars review of claims arising from the decision by the Attorney General to "commence proceedings," remains intact after the passage of the REAL ID Act, which only alters jurisdiction as to the former subsections 1252(a)(2)(B) and (a)(2)(C). REAL ID Act § 106(a)(1)(A)(iii); *see also Fernandez-Ruiz v. Gonzales,* 410 F.3d 585, 587 (9th Cir. 2005).

[2] This Court retains jurisdiction to review this claim. *See Jimenez-Angeles,* 291 F.3d at 599-600.

Magana-Pizano v. INS, 200 F.3d 603, 614 (9th Cir. 1999) (holding that bars on 212(c) relief do not apply to aliens entering pre-AEDPA *nolo contendere* or guilty pleas in reliance on 212(c) availability, but that those bars do apply to aliens convicted through other means prior to the enactment of AEDPA and whose proceedings commenced post-AEDPA); *United States v. Herrera-Blanco,* 232 F.3d 715, 719 (9th Cir. 2000) (same, citing *Magana-Pizano*); *Armendariz-Montoya v. Sonchick,* 291 F.3d 1116, 1121-22 (9th Cir. 2002) (same); *United States v. Hovsepian,* 359 F.3d 1144, 1157 n.6 (9th Cir. 2004) (en banc) (noting, in dicta, the distinction, for purposes of the retroactive application of statutes making previously undeportable aliens deportable, between aliens convicted after trial and those who enter pleas); *see also Kelava v. Gonzales,* 410 F.3d 625, 629-630 (9th Cir. 2005). The IIRIRA was permissibly applied to Appel, and his petition was properly denied.

PETITION DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERMAN APPEL, Petitioner-Appellant, V. ALBERTO R. GONZALES, Attorney General, Respondent-Appellee.	No. 03-56986 D.C. No. CV-03-2259-DOC **JUDGMENT**

Appeal from the United States District Court for the Central District of California, Los Angeles.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment on the said District Court in this cause be, and hereby is **DENIED**.

Filed and entered 08/25/05

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HERMAN APPEL, Petitioner, v. JOHN ASHCROFT, UNITED STATES ATTORNEY GENERAL, *et al.*, Respondents.	NO. CV 03-2259 DOC (FMO) **JUDGMENT** (Filed Oct. 8, 2003)

IT IS ADJUDGED that the above-captioned action is dismissed with prejudice.

DATED: October 6, 2003.

/s/ David O. Carter
DAVID O. CARTER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HERMAN APPEL, Petitioner, v. JOHN ASHCROFT, UNITED STATES ATTORNEY GENERAL, *et al.*, Respondents.	) NO. CV 03-2259 DOC (FMO))) **ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**)) (Filed Oct. 8, 2003)

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records herein, the Magistrate Judge's Report and Recommendation and the objections to the Report and Recommendation. After having made a *de novo* determination of the portions of the Report and Recommendation to which objections were directed, the Court concurs with and adopts the findings and conclusions of the Magistrate Judge. Accordingly, IT IS ORDERED THAT:

1. Judgment shall be entered dismissing the action with prejudice.

2. The Clerk shall serve copies of this Order and the Judgment herein by United States mail on counsel for petitioner and on counsel for respondent.

Dated October 6, 2003.

/s/ David O. Carter
DAVID O. CARTER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HERMAN APPEL, Petitioner, v. JOHN ASHCROFT, UNITED STATES ATTORNEY GENERAL, *et al.*, Respondents.	NO. CV 03-2259 DOC (FMO) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** (Filed Aug. 28, 2003)

This Report and Recommendation is submitted to the Honorable David O. Carter, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

INTRODUCTION

On April 1, 2003, petitioner filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody ("Petition") pursuant to 28 U.S.C. § 2241. Respondent filed a Motion to Dismiss the Petition ("Motion") on June 26, 2003. On August 12, 2003, petitioner filed his Opposition to the Motion ("Opposition").

The matter has been deemed submitted and is ready for decision. Having reviewed the Petition and the matters set forth in the record, the Motion and the Opposition, it is recommended that the Motion be granted and the Petition dismissed with prejudice.

BACKGROUND

Petitioner, a native of Austria, was admitted into the country for permanent residence on September 20, 1979. (Petition, Exh. A at 4 & 71). Petitioner is presently married to a United States citizen and is the parent of two children who are also citizens. (Petition, Exh. A at 4).

On June 19, 1992, a jury convicted petitioner of two counts of sale or transportation of a controlled substance (California Health & Safety Code § 11352(a)) and one count of possession or purchase for sale of a controlled substance (California Health & Safety Code § 11351). (Petition, Exh. A at 72; Motion. Exh. A at 13-14). The jury found that the controlled substance, cocaine, exceeded ten pounds by weight within the meaning of California Health & Safety Code § 11370.4(a)(2). (Motion, Exh. A at 13-14). The state court sentenced petitioner to a term of eight years in prison. (Motion, Exh. A at 12).

On November 16, 1993, petitioner pled guilty to conspiracy to distribute and possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and 846. (Motion, Exh. B at 15). The federal court sentenced him to a term of 54 months in prison. (Motion, Exh. B at 16).

The Immigration and Naturalization Service ("INS") initiated removal proceedings on October 14, 1997, on the charge that petitioner was convicted of an aggravated felony as defined by § 101(a)(43) of the Immigration and Nationality Act ("Act").[1] (Motion, Exh. C at 17). On

[1] Unless otherwise noted, the section numbers cited herein refer to the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*

October 24, 1997, petitioner appeared at a removal hearing before an Immigration Judge ("IJ") where he was formally charged. (Petition, Exh. A at 72; Motion, Exh. D at 19). In subsequent hearings, petitioner submitted a number of applications for relief, specifically a § 212(c) waiver,[2] a § 240A cancellation of removal,[3] and a § 245(a) adjustment of status[4] with accompanying § 212(h) waiver.[5] (Petition, Exh. A at 73; Motion, Exh. D at 20).

On March 10, 1998, the IJ found that petitioner was statutorily ineligible for all of the applications he had filed. (Petition, Exh. A at 75, 78 & 79; Motion, Exh. D at 22, 25 & 26). The IJ specifically found that petitioner was statutorily ineligible for a § 212(c) waiver because such waivers were no longer available at the time petitioner applied.[6] The court held that "[s]ection 212(c) was repealed by Section 204(B) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 110 Stat. 3009-546. Therefore, that application no longer is available for waiver purposes as it no longer exists, being repealed effective before the date of the respondent's assertion and claim[.]" (Petition, Exh. A at 75; Motion, Exh. D at 22) (internal citations omitted). The IJ then ordered petitioner removed from the United States. (Motion Exh. E at 29).

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[2] 8 U.S.C. § 1182(c).

[3] 8 U.S.C. § 1229b.

[4] 8 U.S.C. § 1255.

[5] Petitioner also filed for a § 241(b) temporary withholding of deportation, but his counsel eventually withdrew this claim. (Petition, Exh. A at 73).

[6] Petitioner filed his § 212(c) waiver application on February 6, 1998. (Petition, Exh. A at 75; Motion, Exh. D at 22).

Petitioner timely appealed the IJ's decision to the Board of Immigration Appeals ("BIN"). (Motion, Exh. F at 30). The BIA affirmed the judge's decision removing petitioner from the country. (Motion, Exh. F at 31).

Petitioner then appealed the BIA's decision to the Ninth Circuit. (Motion, Exh. G at 32). The Ninth Circuit dismissed the appeal because § 242(a)(2)(c) divests the court of jurisdiction to review removal orders for persons deemed inadmissible aliens under §§ 237(a)(2)(A)(iii) and 237(a)(2)(B). (Motion, Exh. G at 33-34).

On April 1, 2003, petitioner, though counsel, filed the instant Petition. The Petition raises the following claims: (1) "Petitioner had the jurisdictional abilities to file an application for termination of deportation under Section 212(c) of the Immigration Act, and should have been given a full discretionary hearing on such an application"; (2) petitioners application for a § 212(h) waiver was improperly denied by the immigration judge; (3) the immigration judge based his decision on a misinterpretation of the crime for which petitioner was convicted; and (4) petitioner's state convictions, which underlie the deportation proceedings, are constitutionally invalid. (Petition at ¶ 9(a)-(d)).

DISCUSSION

I. PETITIONER'S CLAIM THAT THE IMMIGRATION JUDGE MISCONSTRUED HIS FELONY CONVICTIONS DOES NOT STATE A CLAIM COGNIZABLE UNDER 28 U.S.C. § 2241.

Petitioner argues that the IJ misconstrued his criminal record and improperly found that petitioner was guilty of both conspiracy for sale and possession of a controlled

substance. (Petition at ¶ 9(c)). Petitioner's claim is not cognizable under 28 U.S.C. § 2241.[7]

Petitioner's claims are governed by the judicial review provisions of IIRIRA.[8] *See Ratnam v. INS*, 154 F.3d 990, 993 n. 1 (9th Cir. 1998) (finding that IIRIRA applies to deportation proceedings initiated after April 1, 1997). Under IIRIRA, petitions of habeas relief from federal custody may solely be brought pursuant to 28 U.S.C. § 2241. *Gutierrez-Chavez v. INS*, 298 F.3d 824, 828 (9th Cir. 2002) (recognizing that the passage of IIRIRA repealed § 106(a)(10) of the Act). The scope of habeas review under 28 U.S.C. § 2241 is limited to claims of constitutional or statutory error. *Id.* at 827.

Here, petitioner does not contend that the review process exercised by the IJ or the BIA was unconstitutional. Instead, it appears that petitioner merely disagrees with their findings. This court, however, may not review issues involving the exercise of discretion. "Habeas petitions that . . . do not allege [constitutional or statutory] error but simply seek to change the discretionary result reached by the INS are not within the scope of § 2241 and

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[7] Respondent argues that this court is bound, through the doctrine of res judicata, by the Ninth Circuit's decision. (Motion at 5-6). Respondent's argument is unpersuasive. It has been consistently held that the doctrine of res judicata is not applicable to habeas corpus proceedings. *Tannehill v. Fitzharris*, 451 F.2d 1322, 1323 (9th Cir. 1971); *Cruz-Sanchez v. Robinson*, 249 F.2d 771, 774 (9th Cir. 1957); *Sanders v. United States*, 373 U.S. 1, 8, 83 S.Ct. 1068, 1073 (1963) ("Conventional notions of finality of litigation have no place where life and liberty is at stake and infringement of constitutional rights is alleged . . . The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.").

[8] 8 U.S.C. § 1252.

should be denied." *Gutierrez-Chavez*, 298 F.3d at 829-30. Thus, petitioner's claim is inappropriate for review under 28 U.S.C. § 2241.

Even if the court could review petitioner's claim, the court would deny it. The abstract of judgment regarding petitioner's June 1992 convictions clearly notes that petitioner was convicted of three felonies, one for "consp/sale/tran cocaine" in violation of California Penal Code § 182(1), one for the "sale/trans cocaine" in violation of California Health & Safety Code § 11352(a) and one for "poss sale cocaine" in violation of California Health & Safety Code § 11351. (Motion, Exh. A at 11). The document is signed by the deputy clerk of court certifying that the document was a "correct abstract of judgment made in [petitioner's] action."[9] (*Id.*). Thus, it is clear that petitioner's two other convictions for crimes involving cocaine – which petitioner does not contest – render him deportable within the meaning of §§ 237(a)(2)(A)(iii) and 237(a)(2)(B). 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission [to the United States] has been convicted of a violation of . . . relating to a controlled substance . . . is deportable."). Whether petitioner was convicted of a third controlled substance charge does not alter his deportability.

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[9] Petitioner perhaps bases his denial of his conspiracy conviction on the fact a "not guilty" verdict sheet was submitted with the abstract of judgment; however, this document is not signed by the jury foreperson nor dated. (Motion, Exh. A at 12). This suggests that the not guilty verdict sheet was not used by the jury and its submission in this case was inadvertent. Notably the guilty verdicts documents submitted with the abstract of judgment are both signed by the foreperson and dated. (*Id.* at 13-14).

II. PETITIONER IS NOT ELIGIBLE FOR § 212(c) RELIEF.

Petitioner argues that he has the "jurisdictional abilities to file an application for termination of deportation under § 212(c) of the Immigration Act, and should have been given a full discretionary hearing on such an application." (Petition at ¶ 9(a)). According to petitioner, the IJ's decision that petitioner was ineligible for § 212(c) constituted improper retroactive application of law. (Petition, Memo at 2-10).

Respondent moves to dismiss this claim on the basis that "the relief which [p]etitioner seeks has been abolished by Congressional amendments and is no longer available under current immigration law. To the extent that the Supreme Court has interpreted the Congressional amendments to allow relief under § 212(c) of the Act in certain narrow circumstances, Petitioner's circumstances do not meet this narrow exception." (Motion at 6).

The court agrees that petitioner is not eligible for relief under § 212(c). Prior to the enactment of IIRIRA, aliens facing deportation could file for a § 212(c) waiver. This statute provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General." *INS v. St. Cyr,* 533 U.S. 289, 295, 121 S.Ct. 2271, 2276 (2001).

In September 1996, Congress repealed § 212(c) through the passage of IIRIRA. The effective date of the IIRIRA was April 1, 1997. *Jimenez-Gonzales v. Ashcroft*, 291 F.3d 594, 596 (9th Cir. 2002). Here, the INS did not

initiate removal proceedings against petitioner until October 14, 1997, more than six months after the repeal of § 212(c). Thus, relief under § 212(c) was clearly not available to petitioner. Petitioner, however, argues that, because his conviction occurred prior to the passage of IIRIRA, denial of a § 212(c) waiver constitutes an impermissible retroactive application of IIRIRA.

"[A] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Landgraf v. USI Film Products*, 511 U.S. 244, 269, 114 S.Ct. 1483, 1499 (1994). Rather, a "statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321, 121 S.Ct. at 2290; *see Landgraf*, 511 U.S. at 269-70, 114. S.Ct. at 1499.

In *Jimenez-Angeles*, the petitioner was an undocumented alien who turned herself into the INS on March 6, 1997, less than a month before the IIRIRA became effective. 291 P.3d at 596. Although the INS did not institute deportation proceedings against Jimenez-Angeles until November 1998, the IJ and BIA found petitioner removable. *Id.* Jimenez-Angeles appealed, arguing "that she is like the alien in *St. Cyr* who pled guilty prior to IIRIRA's effective date 'in reliance on the possibility of § 212(c) [suspension of deportation] relief.'" *Id.* at 600 (quoting *St Cyr,* 533 U.S. at 315, 121 S.Ct. at 2287) (italics and brackets in original). The Ninth Circuit rejected her argument, stating that "because the circumstances of Jimenez-Angeles' case vary significantly from those in *St. Cyr*, application of IIRIRA's permanent rules to [Jimenez-Angeles] are not

impermissibly retroactive." *Id.* at 601. Among other things, the court distinguished St. Cyr and stated that "although Jimenez-Angeles may have had an expectation (or at least a hope) that suspension of deportation would be available to her when she turned herself in voluntarily before IIRIRA's effective date, that expectation (or hope) was not equivalent to the settled expectation St. Cyr gained by entering into his plea bargain before that date." *Id.* at 602.

If a person who turned herself in before IIRIRA's effective date was not entitled to the *St. Cyr* exception, then petitioner, who was convicted by a jury before IIRIRA's effective date, clearly is not entitled to the exception. Petitioner had no "settled expectations" that flowed from his conviction by a jury. Thus, applying IIRIRA to petitioner's conviction was not impermissibly retroactive. *See Jimenez-Angeles*, 291 F.3d at 601-02.

Like petitioner's retroactive application argument, petitioner's assertion that all convictions, whether derived from plea agreements or jury trials, qualify for the *St. Cyr* exception, is unpersuasive. First, petitioner cites no language in *St. Cyr* or any other federal opinion supporting this interpretation.[10] Instead, he quotes from an immigration treatise (Opposition at 4) which notes that petitioner's argument is unsettled: "The argument that the noncitizen remains eligible is more difficult here since there is no plea, and therefore the settled expectations of the noncitizen are less clear." (Opposition, Exh. D at 20).

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[10] The case petitioner cites for support, *Alberto-Bed ova-Valencia v. INS*, 6 F.3d 891 (2nd Cir. 1993), involved deportation proceedings initiated prior to the repeal of § 212(c). In this case, INS initiated removal proceedings against petitioner more than one year after the repeal of § 212(c).

Second, the Ninth Circuit's interpretation of *St. Cyr*, leaves little doubt that *St. Cyr* is limited to the plea bargain situation. As the Ninth Circuit stated:

> St. Cyr reasonably relied on the fact that his plea would preserve his eligibility for suspension of deportation. He had a settled expectation that suspension of deportation would continue to be available to him, and also reasonably believe that there was a substantial chance that his application for such relief would be granted, given the high percentage of successful applicants for suspension of deportation.

Jimenez-Gonzales, 291 F.3d at 602. In rejecting the petitioner's claim, the Ninth Circuit stated that "[t]he factors that militated in favor of St. Cyr – in particular, his 'settled expectations' based on 'transactions or considerations already past' – are not present in Jimenez-Angeles' case." *Id.* Here, petitioner's convictions did not result from any plea agreement, but rather from a jury trial. (Motion, Exh. A at 11 & 13-14). Therefore, petitioner does not qualify for the exception.[11]

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[11] Even assuming petitioner could have applied for a § 212(c) waiver, it is likely that he would not have qualified for such waiver given his three convictions involving the trafficking of cocaine and his prison term of eight years. In 1992, § 212(c) excluded any alien who ha[d] been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years" from consideration for waiver. Illicit trafficking in a controlled substance qualified as an "aggravated felony." 8 U.S.C. § 1101(a)(43)(B).

III. PETITIONER IS INELIGIBLE FOR A § 212(H) WAIVER.

Petitioner argues that he was improperly found ineligible to apply for relief under § 212(h). He states that "[a]t the time of the immigration proceedings I had been married over 20 years to a U.S. citizen and had two U.S. citizen children, I also had a successful business that had over 100 employees. My wife wanted to re-immigrate me with an immediate relative petition and the Judge said there was no jurisdiction for her to file such petition, even though he had ruled that I was removable." (Petition at 9(b)). Respondent asserts that petitioner's "argument lacks merit because as an alien convicted of an aggravated felony, he is statutorily ineligible for relief under § 212(h). (Return at 8).

Section 212(h) provides that the "Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), [crimes involving moral turpitude], (B) [multiple criminal convictions], (D) [prostitution and commercialized vice], and (E) [criminal aliens asserting immunity] of subsection (a)(2) of this section and subparagraph (A)(ii)(II) [crime involving controlled substances] of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana" it would cause extreme hardship on the alien's spouse or remaining child in the United States. 8 U.S.C. § 1182(h). This provision applies to petitioner because his wife and children are United States citizens. (Petition, Exh. A at 4).

However, the categories of offenses eligible for waiver under § 212(h) do not include crimes involving controlled substances. Therefore, petitioner's convictions involving controlled substances make him ineligible for relief under § 212(h). In fact, like § 212(c), IIRIRA amended § 212(h)

and eliminated the discretion of the Attorney General to grant a waiver to an alien who "has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . the alien was convicted of an aggravated felony[.]" 8 U.S.C. § 1182(h). Accordingly, petitioner is not eligible for relief under § 212(h).

IV. PETITIONER'S ARGUMENT CHALLENGING THE VALIDITY OF HIS STATE CONVICTION DOES NOT STATE A CLAIM COGNIZABLE UNDER 28 U.S.C. § 2241.

Petitioner claims that his INS detention is improper because his underlying state convictions were constitutionally invalid. According to petitioner, his attorney rendered ineffective assistance by never advising him on the consequences of a jury verdict on his immigration status. (Petition at ¶ 9(d)). Respondent, however, points out that the "proper procedure to challenge a state court conviction is by way of habeas petition pursuant to 28 U.S.C. § 2254." (Motion, Memo at 9-10).

Federal Habeas relief, pursuant to 28 U.S.C. § 2241, may be granted only where the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." The INS, as an administrative agency, is "not competent to inquire into the validity of state criminal convictions." *Contreras v. Schiltgen*, 122 F.3d 30, 32 (9th Cir. 1997), *aff'd* 151 F. 3d 906 (9th Cir. 1998) ("*Contreras I*"); *see Contreras v. Schiltgen*, 151 F. 3d 906, 907 (9th Cir. 1998) ("*Contreras II*"), "The validity of the . . . California conviction can only be tested in an action against the state, which has the greatest interest in preserving its judgment and the best ability to either correct or defend it." *Contreras I*, 122 F.3d at 33. The INS

may thus "rely on the validity of the state court convictions until it is overturned in collateral proceedings against the state." *Contreras II*, 151 F.3d at 907; *see Contreras I*, 122 F.3d at 33 (unless petitioner has overturned his conviction in a collateral action against the state, the INS may rely on it as a lawful basis for detention and deportation."). Consequently, the Ninth Circuit has held that "criminal convictions may not be collaterally attacked in deportation proceedings." *Contreras I*, 122 F.3d at 32.

Petitioner may challenge his state conviction or sentence only through a habeas petition filed pursuant to 28 U.S.C. § 2254. *See Contreras I*, 122 F.3d at 33. To seek such review, petitioner must be in the custody of the state and not the INS, and petitioner must name the state officer having custody of him as a respondent.[12] *Stanley v. California Sup. Ct.*, 21 F.3d 359, 360 (9th Cir, 1994).

In short, petitioner may not collaterally attack his state court conviction in these deportation proceedings.[13]

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[12] In any event, the INS is not a proper respondent in a habeas petition filed under 28 U.S.C. § 2241. When a § 2241 petitioner is in federal custody awaiting removal, the proper respondent is the Director of Homeland Security or, if removal is based upon act committed prior to the creation of the Department of Homeland Security, the United States Attorney General. *Armentero v. INS*, 2003 WL 22004997, *15, 2003 U.S. App. LEXIS 17754, *39-*40 (9th Cir. August 26, 2003).

[13] The court recognizes that petitioner's ability to apply for habeas relief pursuant to 28 U.S.C. § 2254 may be foreclosed by the expiration of his state sentence. The Ninth Circuit, however, considered that fact in *Contreras I* and *II* and nevertheless held that petitioner could not apply for relief under § 2241. *Contreras I*, 122 F. 3d at 33: *Contreras II*, 151 F.3d at 907 (citing *Malang v. Cook*, 490 U.S. 488, 492, 109 S.Ct. 1923 (1989)).

Contreras I, 122 F.3d at 32. Habeas relief pursuant to 28 U.S.C. § 2241 is unavailable in this case.

RECOMMENDATION

Based on the foregoing, IT IS RECOMMENDED that the District Court issue an Order.

(1) accepting and adopting this Report and Recommendation;

(2) granting respondent's Motion to Dismiss (**Document No. 10-1**); and

(3) denying the Petition and directing that Judgment be entered dismissing the Petition with prejudice.

Dated this 28 day of August, 2003.

/s/ Fernando M. Olguin
Fernando M. Olguin
United States
Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

4 Fed. Appx. 425

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERMAN APPEL, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 99-70211 I&NS No. A36-073-268 MEMORANDUM[1] (Filed Feb. 20, 2001)

On Petition for Review of an Order
of the Board of Immigration Appeals

Submitted Feb. 6, 2001.[2]
Pasadena, California

Before: PREGERSON, CANBY, and THOMPSON, Circuit Judges.

Herman Appel, a native and citizen of Austria, petitions for review of the decision of the Board of Immigration Appeals dismissing his appeal of the immigration judge's order finding him removable as charged. The IJ determined that Appel was removable pursuant to INA

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

§§ 237(a)(2)(A)(iii)[3] and 237(a)(2)(B)(i)[4] because of his June 1992 convictions for possession of cocaine, sale or transportation of cocaine, and conspiracy to sell cocaine in violation of California Health and Safety Code §§ 11351 and 11352(a). On appeal, the BIA found that Appel was statutorily ineligible for a waiver of inadmissibility pursuant to INA § 212(c) because the availability of such relief was removed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) provides: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in ... section 237(a)(2)(A)(iii), (B), (C) or (D) [8 U.S.C.A. § 1227(a)(2)(A)(iii), (B), (C), or (D)]...."[5] We have jurisdiction to determine whether Appel has committed a deportable offense, but we must dismiss his petition for lack of jurisdiction if we conclude that he has. *Flores-Miramontes v. INS*, 212 F.3d 1133, 1135 (9th Cir. 2000). Because we conclude that Appel committed offenses covered in INA §§ 237(a)(2)(A)(iii) and 237(a)(2)(B), we dismiss his petition for review.

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[3] INA § 237(a)(2)(A)(iii) provides that "Any alien ... in and admitted to the United States, shall ... be removed if the alien ... is convicted of an aggravated felony at any time after admission...."

[4] INA § 237(a)(2)(B)(i) provides that "Any alien ... in and admitted to the United States, shall ... be removed if the alien ... has been convicted of a violation (or a conspiracy or attempt to violate) of any law or regulation of a state ... relating to a controlled substance...."

[5] The permanent rules of IIRIRA apply to this case because the INS initiated removal proceedings against Appel after April 1, 1997. *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997).

We note that in *Flores-Miramontes*, we held that even though IIRIRA removed our jurisdiction to consider petitions for review on direct appeal, IIRIRA's permanent rules did not repeal the statutory habeas corpus remedy available via 28 U.S.C. § 2241. *Flores-Miramontes*, 212 F.3d at 1136-38. The scope of habeas review under § 2241 extends to both the constitutional and statutory questions. *Id.* Therefore, Appel may raise his claims in a habeas petition filed with the district court.

PETITION DISMISSED.

U.S. Department of Justice

Executive Office for Immigration Review
Board of Immigration Appeals
[SEAL] *Office of the Clerk*

P.O. Box 8530
5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Bonaparte, Ronald H., Esq.
11911 San Vicente Blvd.,
Suite 355,
Los Angeles, CA 90049

Office of the District
Counsel/LO
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

February 19, 1999

APPEL, HERMAN
A#: 36-073-268

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very Truly Yours,

Paul W. Schmidt
Chairman
/s/ Paul W. Schmidt

Enclosure

Panel Members:

ROSENBERG, LORY D.
VACCA, FRED W.
VILLAGELIU, GUS

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A36 073 268 – Los Angeles Date: Feb. 19, 1999

In re: HERMAN APPEL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ronald H. Bonaparte, Esquire

ON BEHALF OF SERVICE: James M. Left
Assistant District Counsel

CHARGE:

Order: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i) – Convicted of controlled substance violation

ORDER:

PER CURIAM. The respondent has timely appealed from an Immigration Judge's decision dated March 10, 1998, ordering his removal from the United States. The Immigration Judge's decision shall be affirmed. The request for oral argument is denied.

On appeal, the respondent contends that he was denied a full and fair hearing because the Immigration and Naturalization Service delayed in instituting immigration proceedings against him. He further contends that he is eligible for a waiver of inadmissibility pursuant to

section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Furthermore, the respondent contends that he is eligible for adjustment of status pursuant to section 245(a) of the Act, 8 U.S.C. § 1255(a), in conjunction with a waiver of inadmissibility under section 212(h).

Initially, we note that the Service's decision regarding the commencement of proceedings are not reviewable by the Board. *See Matter of G-N-C-*, Interim Decision 3366 (BIA 1998). Although the Service may have issued a detainer against the respondent in 1994, the Board is without jurisdiction to review the Service's decision to commence removal proceedings in 1997.

Turning to section 212(c) relief, we note that the respondent was placed in removal proceedings by the Immigration and Naturalization Service. Since he is in removal proceedings, a waiver of inadmissibility under section 212(c) is not a form of relief that is available. *See* section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"). Therefore, we do not need to address the respondent's arguments regarding section 212(c) relief.

Next, we find that the Immigration Judge properly pretermitted the respondent's request for adjustment of status in conjunction with a waiver of inadmissibility under section 212(h) of the Act. In order to establish his eligibility for adjustment of status, the respondent must obtain section 212(h) relief. However, his drug-related convictions (conspiracy of sale or transportation of controlled substance, sale or transportation of controlled sub stance, and possession/sale of cocaine) meet the definition of an aggravated felony as defined in section 101(a)(43)(B)

of the Act, 8 U.S.C. § 1101(a)(43)(B). Since the respondent has been convicted of an aggravated felony and is a lawful permanent resident, he is statutorily ineligible for section 212(h) relief. *See Matter of Yeung*, Interim Decision 3297 (BIA 1996).

Finally, the respondent contends that the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") and ORRERY violates the constitution. However, we cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos,* Interim Decision 3318 (BIA 1997); *Matter of C-*, Interim Decision 3180 (BIA 1992).

Accordingly, the appeal is dismissed.

/s/ Fred W. Vacca
FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERMAN APPEL, Petitioner-Appellant, v. ALBERTO R. GONZALES, Attorney General, Respondent-Appellee.	No. 03-56986 D.C. No. CV-03-02259-DOC Central District of California, Los Angeles ORDER (Filed Apr. 17, 2006)

Before: FARRIS, D.W. NELSON, and TALLMAN, Circuit Judges.

Appellant's Petition for Panel Rehearing is DENIED.

U.S. CONST. AMENDMENT V. GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each

State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

8 U.S.C. § 1182 (1995). Excludable aliens

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent resident who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

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8 U.S.C. § 1182 (1997). Excludable aliens

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B),

(C), or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1251(a)(2)(A)(i) of this title.

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8 U.S.C. § 1182 (1998). Excludable aliens

(c) Repealed. Pub.L. 104-208, Div. C, Title III, § 304(b), Sept. 30, 1996, 110 Stat. 3009-597

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8 U.S.C. § 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

UNITED STATES PUBLIC LAWS
104th Congress – Second Session
Convening January 3, 1996

PL 104-132 (S 735)
April 24, 1996
ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

An Act to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes.

Be it enacted by the Senate and
House of Representatives of the
United States of America in Congress assembled,

SEC. 440. CRIMINAL ALIEN REMOVAL.

(d) CLASSES OF EXCLUDABLE ALIENS. – Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended –

(1) by striking "The first sentence of this" and inserting "This"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).".

Approved April 24, 1996.

UNITED STATES PUBLIC LAWS
104th Congress - Second Session
Convening January 3, 1996

PL 104-208 (HR 3610)
September 30, 1996
OMNIBUS CONSOLIDATED
APPROPRIATIONS ACT, 1997

An Act making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION C - ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

SEC. 304. REMOVAL PROCEEDINGS; CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS; VOLUNTARY DEPARTURE (REVISED AND NEW SECTIONS 239 TO 240C).

(b) REPEAL OF SECTION 212(c). - Section 212(c) (8 U.S.C. 1182(c)) is repealed.

SEC. 309. EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL. - Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

(b) PROMULGATION OF REGULATIONS. – The Attorney General shall first promulgate regulations to carry out this subtitle by not later than 30 days before the title III-A effective date.

(c) TRANSITION FOR ALIENS IN PROCEEDINGS. –

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY. – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date –

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(2) ATTORNEY GENERAL OPTION TO ELECT TO APPLY NEW PROCEDURES. – In a case described in paragraph (1) in which an evidentiary hearing under section 236 or 242 and 242B of the Immigration and Nationality Act has not commenced as of the title III-A effective date, the Attorney General may elect to proceed under chapter 4 of title II of such Act (as amended by this subtitle). The Attorney General shall provide notice of such election to the alien involved not later than 30 days before the date any evidentiary hearing is commenced. If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.

(3) ATTORNEY GENERAL OPTION TO TERMINATE AND REINITIATE PROCEEDINGS. – In the case

described in paragraph (1), the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision and to reinitiate proceedings under chapter 4 of title II the Immigration and Nationality Act (as amended by this subtitle). Any determination in the terminated proceeding shall not be binding in the reinitiated proceeding.

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW. – In the case described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary –

(A) in the case of judicial review of a final order of exclusion, subsection (b) of such section shall not apply and the action for judicial review shall be governed by the provisions of subsections (a) and (c) of such in the same manner as they apply to judicial review of orders of deportation;

(B) a court may not order the taking of additional evidence under section 2347(c) of title 28, United States Code;

(C) the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation;

(D) the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge were completed;

(E) there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act);

(F) service of the petition for review shall not stay the deportation of an alien pending the court's decision on the petition, unless the court orders otherwise; and

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

(5) TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION. – Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

(6) TRANSITION FOR CERTAIN FAMILY UNITY ALIENS. – The Attorney General may waive the application of section 212(a)(9) of the Immigration and Nationality Act, as inserted by section 301(b)(1) of this division, in the case of an alien who is provided benefits under the provisions of section 301 of the Immigration Act of 1990 (relating to family unity).

(7) LIMITATION ON SUSPENSION OF DEPORTATION. – The Attorney General may not suspend the deportation and adjust the status under section 244 of the Immigration and Nationality Act of more than 4,000 aliens in any fiscal year (beginning after the date of the enactment of this Act). The previous sentence shall apply regardless of when an alien applied for such suspension and adjustment.

(d) TRANSITIONAL REFERENCES. – For purposes of carrying out the Immigration and Nationality Act, as amended by this subtitle –

(1) any reference in section 212(a)(1)(A) of such Act to the term "inadmissible" is deemed to include a reference to the term "excludable", and

(2) any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation.

(e) TRANSITION. – No period of time before the date of the enactment of this Act shall be included in the period of 1 year described in section 212(a)(6)(B)(i) of the Immigration and Nationality Act (as amended by section 301(c) of this division).

Approved September 30, 1996.

8 C.F.R. § 212.3 (1992) Application for the exercise of discretion under section 212(c).

(a) Jurisdiction. An application for the exercise of discretion under section 212(c) of the Act shall be submitted on Form I-191, Application for Advance Permission to Return to Unrelinquished Domicile, to:

(1) The district director having jurisdiction over the area in which the applicant's intended or actual place of residence in the United States is located; or

(2) The Office of the Immigration Judge if the application is made in the course of proceedings under sections 235, 236, or 242 of the Act.

(b) Filing of application. The application may be filed prior to, at the time of, or at any time after the applicant's departure from or arrival into the United States. All material facts and/or circumstances which the applicant knows or believes apply to the grounds of excludability or deportability must be described. The applicant must also submit all available documentation relating to such grounds.

(c) Decision of the District Director. A district director may grant or deny an application for advance permission to return to an unrelinquished domicile under section 212(c) of the Act, in the exercise of discretion, unless otherwise prohibited by paragraph (f) of this section. The applicant shall be notified of the decision and, if the application is denied, of the reason(s) for denial. No appeal shall lie from denial of the application, but the application may be renewed before an Immigration Judge as provided in paragraph (e) of this section.

(d) Validity. Once an application is approved, that approval is valid indefinitely. However, the approval covers only those specific grounds of excludability or deportability that were described in the application. An application who failed to describe any other grounds of excludability or deportability, or failed to disclose material facts existing at the time of the approval of the application, remains excludable or deportable under the previously unidentified grounds. If at a later date, the applicant becomes subject to exclusion or deportation based upon these previously unidentified grounds or upon new ground(s), a new application must be filed with the appropriate district director.

(e) Filing or renewal of applications before an Immigration Judge.

(1) An application for the exercise of discretion under section 212(c) of the Act may be renewed or submitted in proceedings before an Immigration Judge under sections 235, 236, or 242 of the Act, and under this chapter. Such application shall be adjudicated by the Immigration Judge, without regard to whether the applicant previously has made application to the district director.

(2) The Immigration Judge may grant or deny an application for advance permission to return to an unrelinquished domicile under section 212(c) of the Act, in the exercise of discretion, unless otherwise prohibited by paragraph (f) of this section.

(3) An alien otherwise entitled to appeal to the Board of Immigration Appeals may appeal the denial by the Immigration Judge of this application in accordance with the provisions of § 3.36 of this chapter.

(f) Limitations on discretion to grant an application under section 212(c) of the Act. A district director or Immigration Judge shall deny an application for advance permission to enter under section 212(c) of the Act if:

(1) The alien has not been lawfully admitted for permanent residence;

(2) The alien has not maintained lawful domicile in the United States, as either a lawful permanent resident or a lawful temporary resident pursuant to section 245A or section 210 of the Act, for at least seven consecutive years immediately preceding the filing of the application;

(3) The alien is subject to exclusion from the United States under paragraphs (3)(A), (3)(B), (3)(C), or (3)(E) of section 212(a) of the Act;

(4) The alien has been convicted of an aggravated felony, as defined by section 101(a)(43) of the Act, and has served a term of imprisonment of at least five years for such conviction; or

(5) The alien applies for relief under section 212(c) within five years of the barring act as enumerated in one or more sections of section 242B(e)(1) through (4) of the Act.

California Penal Code § 2933. Worktime credits on sentences; amount; forfeiture; restoration; review

(a) It is the intent of the Legislature that persons convicted of a crime and sentenced to the state prison under Section 1170 serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Director of Corrections for performance in work, training or education programs established by the Director of Corrections. Worktime credits shall apply for performance in work assignments and performance in elementary, high school, or vocational education programs. Enrollment in a two-or four-year college program leading to a degree shall result in the application of time credits equal to that provided in Section 2931. For every six months of full-time performance in a credit qualifying program, as designated by the director, a prisoner shall be awarded worktime credit reductions from his or her term of confinement of six months. A lesser amount of credit based on this ratio shall be awarded for any lesser period of continuous performance. Less than maximum credit should be awarded pursuant to regulations adopted by the director for prisoners not assigned to a full-time credit qualifying program. Every prisoner who refuses to accept a full-time credit qualifying assignment or who is denied the opportunity to earn worktime credits pursuant to subdivision (a) of Section 2932 shall be awarded no worktime credit reduction. Every prisoner who voluntarily accepts a half-time credit qualifying assignment in lieu of a full-time assignment shall be awarded worktime credit reductions from his or her term of confinement of three months for each six-month period of continued performance. Except as provided in subdivision (a) of Section 2932, every prisoner willing to participate in a full-time credit qualifying assignment but who is either not assigned to a

full-time assignment or is assigned to a program for less than full time, shall receive no less credit than is provided under Section 2931. Under no circumstances shall any prisoner receive more than six months' credit reduction for any six-month period under this section.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 122 — HON. J. STEPHEN CZULEGER, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. JACK PASTERNACK, FRANK FRED MILLMAN, RAMI KETER, HERMAN APPEL, DEFENDANTS.	NO. BA041982

REPORTERS' DAILY TRANSCRIPT

VOLUME I

THURSDAY, MAY 21, 1992

THURSDAY, MAY 28, 1992

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* * *

LOS ANGELES, CALIFORNIA;
WEDNESDAY, MAY 20, 1992 11:40 A. M.

DEPARTMENT NO. 122 — HON. J. STEPHEN CZULEGER, JUDGE

APPEARANCES:

THE DEFENDANT, JACK PASTERNACK, WITH HIS COUNSEL, TERRENCE RODEN, ATTORNEY AT LAW; THE DEFENDANT, FRANK FRED MILLMAN, WITH HIS COUNSEL, ANTHONY BROOKLIER, ATTORNEY AT LAW; THE DE-

FENDANT, RAMI KETER, WITH HIS COUNSEL, ALLAN EISNER, ATTORNEY AT LAW; THE DEFENDANT, HERMAN APPEL, WITH HIS COUNSEL, ROGER ROSEN, ATTORNEY AT LAW; NANCY LIDAMORE, DEPUTY DISTRICT OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA; THE FOLLOWING PROCEEDINGS WERE HELD:

(PAUL J. RUNYON, CSR, #8797, OFFICIAL REPORTER.)

(M. HELEN THEISS, CSR, #2264, OFFICIAL REPORTER.)

THE COURT: PEOPLE VERSUS PASTERNACK, MILLMAN, KETER AND APPEL.

COUNSEL, PLEASE MAKE YOUR APPEARANCES

MR. ROSEN: ROGER ROSEN ON BEHALF OF MR. APPEL. HE IS PRESENT IN COURT IN CUSTODY.

MR. EISNER: ALAN EISNER ON BEHALF OF MR. KETER, WHO IS PRESENT.

MR. BROOKLIER: ANTHONY BROORLIER FOR MR. MILLMAN.

[2] MR. RODEN: TERENCE RODEN WITH MR. PASTERNACK, WHO IS PRESENT IN COURT.

MS. LIDAMORE: NANCY LIDAMORE FOR THE PEOPLE.

THE COURT: WE ARE SET FOR TRIAL. I WILL ASSUME THERE'S NOT GOING TO BE A DISPOSITION.

HAS THERE BEEN ANY LAST, FINAL OFFER?

MS. LIDAMORE: THE OFFER IS THE SAME.

THE COURT: CAN WE PUT IT ON THE RECORD SO THE DEFENDANTS KNOW?

MS. LIDAMORE: SURE.

AS TO MR. PASTERNACK AND MR. MILLMAN, THE OFFER IS NINE YEARS.

AS TO MR. KETER, THE OFFER IS 12 YEARS DUE TO HIS PRIOR CONVICTION AND OUT-ON-BAIL STATUS.

AS TO MR. APPEL, THE OFFER IS SEVEN YEARS.

THE COURT: ALL RIGHT.

MR. APPEL, IS THAT YOUR UNDERSTANDING?

DEFENDANT APPEL: YES, YOUR HONOR.

THE COURT: YOU DON'T WANT TO TAKE ADVANTAGE OF THAT?

DEFENDANT APPEL: NO.

THE COURT: MR. KETER, THAT'S YOUR UNDERSTANDING?

DEFENDANT KETER: YES.

THE COURT: YOU DON'T WANT TO TAKE ADVANTAGE OF THAT?

DEFENDANT KETER: NO.

THE COURT: MR. MILLMAN, THAT'S YOUR UNDERSTANDING?

DEFENDANT MILLMAN: YES.

[3] THE COURT: AND YOU DO NOT WISH TO TAKE ADVANTAGE OF THAT?

DEFENDANT MILLMAN: YES.

THE COURT: MR. PASTERNACK, THAT'S YOUR UNDERSTANDING?

DEFENDANT PASTERNACK: YES.

THE COURT: AND YOU DO NOT WISH TO TAKE ADVANTAGE OF IT?

DEFENDANT PASTERNACK: YES.

THE COURT: WE ARE SET FOR TRIAL.

* * *

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(3)

No. 06-72

FILED
OCT 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

HERMAN APPEL, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
BARRY J. PETTINATO
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

As a result of the 1996 amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a removable alien is ineligible for a discretionary waiver of inadmissibility under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994), if the alien was previously convicted of an aggravated felony. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court, based on principles of non-retroactivity, held that the 1996 amendments do not apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether this Court's holding in *St. Cyr* applies to an alien who rejected a plea agreement and was convicted of an aggravated felony after trial.

2. Whether the 1996 amendments apply to an alien who did not affirmatively seek Section 212(c) relief before he was placed in removal proceedings.

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In the Supreme Court of the United States

No. 06-72

HERMAN APPEL, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter*, but is *reprinted in* 146 Fed. Appx. 175. The order of the district court (Pet. App. 6-7) is unreported. The report and recommendation of the magistrate judge (Pet. App. 8-21) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5) was entered on August 25, 2005. A petition for rehearing was denied on April 17, 2006 (Pet. App. 29). The petition for a writ of certiorari was filed on July 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized a permanent resident alien with a lawful unrelinquished domicile of seven consecutive years to apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). In the Immigration Act of 1990, Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. Pub. L. No. 101-649, § 511, 104 Stat. 5052. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien previously convicted of certain types of offenses, including an aggravated felony or a controlled-substance offense, without regard to the amount of time spent in prison. Pub. L. No. 104-132, § 440(d), 110 Stat. 1277.

Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A precludes from discretionary relief an alien who has been convicted of an aggravated felony. See 8 U.S.C. 1229b(a)(3). In *St. Cyr*, *supra*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement if, at the time of the

plea agreemen e conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

2. Petitioner is a native and citizen of Austria. In 1979, he was admitted to the United States as a lawful permanent resident. In 1992, a jury found him guilty of two counts of sale or transportation of a controlled substance (cocaine) and one count of possession or purchase for sale of a controlled substance (cocaine), in violation of California law. Before proceeding to trial, petitioner had rejected a plea agreement offering a term of imprisonment of seven years. Petitioner was sentenced to a term of imprisonment of eight years, and he served less than five years. In 1993, petitioner pleaded guilty to conspiracy to distribute and possession with intent to distribute a controlled substance in violation of federal law. He was sentenced to a term of imprisonment of 54 months, to run concurrently with his state conviction. Pet. 6-7; Pet. App. 9, 48.

In 1997, on the basis of petitioner's 1992 convictions, the government commenced removal proceedings against him. The government alleged that petitioner was deportable as an alien who had been convicted of an aggravated felony and controlled substance offenses. See 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii) and (B)(i). On March 10, 1998, the immigration judge (IJ) found petitioner deportable as charged and ordered petitioner removed. The IJ concluded that petitioner was ineligible for discretionary relief under former Section 212(c) because IIRIRA had repealed such relief for aliens convicted of an aggravated felony. Pet. App. 9-10. The Board of Immigration Appeals (BIA) affirmed the IJ's decision and dismissed petitioner's appeal. *Id.* at 26-28. Petitioner appealed the BIA's decision to the Ninth Cir-

cuit, which dismissed the petition for lack of jurisdiction. *Id.* at 22-24.

3. In April 2003, petitioner filed a petition for a writ of habeas corpus in the district court. Pet. App. 8. Relying on principles of non-retroactivity as applied in this Court's decision in *St. Cyr*, petitioner argued that, because his relevant criminal convictions predated IIRIRA, that statute's repeal of Section 212(c) relief was not applicable to him. The district court rejected petitioner's argument. Pet. App. 7, 14-17. The court reasoned that *St. Cyr* was inapplicable because petitioner was convicted after a trial rather than through a guilty plea, and that unlike an alien whose conviction was based on a guilty plea, "[p]etitioner had no 'settled expectations' that flowed from his conviction by a jury." *Id.* at 16.

The court of appeals, after converting petitioner's habeas appeal into a proceeding on a petition for review pursuant to Section 106(c) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 311, denied the petition for review in an unpublished memorandum order. Pet. App. 1-4. The court relied on its previous decisions holding that *St. Cyr* is inapplicable, and that the repeal of Section 212(c) therefore applies, to an alien whose pre-IIRIRA conviction followed a trial rather than a guilty plea. *Id.* at 3-4.

ARGUMENT

1. Petitioner contends (Pet. 9-19) that the holding of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which involved aliens convicted of an aggravated felony through a plea agreement, should be extended to aliens who rejected a plea agreement and were convicted of an aggravated

felony after trial. That contention lacks merit and does not warrant review.

a. In *St. Cyr*, this Court addressed the situation of aliens who pleaded guilty after Section 212(c) was amended in 1990 to render ineligible for relief any alien convicted of an aggravated felony who had served a prison term of at least five years. A plea agreement providing for a sentence of less than five years thus would have assured the alien's eligibility for relief under then-current law. See 533 U.S. at 293, 321-324. This Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." *Id.* at 321-322 (internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon [the] likelihood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

St. Cyr therefore was grounded in the notion that, because aliens in St. Cyr's position would have based their decision to plead guilty on the continued availability of discretionary relief, the plea of guilty gave rise to a reasonable reliance interest and expectations in pre-

serving eligibility for that relief. In short, as the Court recently observed in describing the reasoning of *St. Cyr*, the "possible discretionary relief" was "a focus of expectation and reliance" in the decision to plead guilty as part of a "*quid pro quo* agreement." *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2432 & n.10 (2006) (citing *St. Cyr*, 533 U.S. at 323).

The courts of appeals have uniformly declined to extend the holding of *St. Cyr* to aliens who were convicted of an aggravated felony after a trial rather than through a guilty plea. See *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (5th Cir.), cert. denied, No. 05-1251 (Oct. 2, 2006); *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002); *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1036-1037 (7th Cir. 2004) (per curiam); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-1122 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1273-1274 (11th Cir. 2002). Those courts have correctly concluded that "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." *Hernandez-Castillo*, 436 F.3d at 520 (quoting *Rankine*, 319 F.3d at 99).

In particular, unlike an alien who pleaded guilty, an alien who went to trial did not "detrimentally change[] his position in reliance on continued eligibility for § 212(c) relief." *Hernandez-Castillo*, 436 F.3d at 520 (quoting *Rankine*, 319 F.3d at 99). An alien who pleaded guilty "would have participated in the *quid pro quo* relationship, in which a greater expectation of relief is provided in exchange for forgoing a trial," thus implicating

"the reliance interest emphasized by [this] Court in *St. Cyr*." *Ibid.* (quoting *Rankine*, 319 F.3d at 100). Aliens who elected to go to trial, by contrast, "made no decision to abandon any rights and admit guilt—thereby immediately rendering themselves deportable—in reliance on the availability of the relief offered prior to IIRIRA." *Id.* at 520 n.3 (quoting *Rankine*, 319 F.3d at 99). Their decision to go to trial, "standing alone, had no impact on their immigration status," and "[u]nless and until they were convicted of their underlying crimes," they "could not be deported." *Ibid.* (quoting *Rankine*, 319 F.3d at 99). Such aliens, unlike aliens who pleaded guilty, therefore could make no "claim that they relied on the availability of § 212(c) relief in making the decision to go to trial." *Ibid.* (quoting *Rankine*, 319 F.3d at 99).

b. In *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004), the Third Circuit concluded that the holding of *St. Cyr* applied in one particular circumstance to an alien who was convicted of an aggravated felony after trial—specifically, if the alien declined a plea agreement that was offered to him and was subsequently convicted at trial. *Id.* at 494. The court reasoned that aliens "who affirmatively turned down a plea agreement had a reliance interest in the potential availability of § 212(c) relief." *Ibid.* In the court's view, "the then-existing parameters for former § 212(c) eligibility would * * * obviously factor into the decision-making of someone" when deciding whether to accept a plea offer, in that the alien would "need[] to ensure that * * * he would serve less than the five years specified in former § 212(c)." *Ibid.*[1]

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[1] Although the court in *Ponnapula* emphasized that the alien would need to ensure that he would serve less than five years of imprisonment

The *Ponnapula* court's reasoning lacks merit. *St. Cyr* was grounded in the belief that aliens who entered a plea of guilty "waive[d] several of their constitutional rights (including the right to a trial)" in "exchange for some perceived benefit," *i.e.*, "preserving the possibility of [Section 212(c)] relief." *St. Cyr*, 533 U.S. at 322-323. Such aliens, the Court reasoned, "almost certainly relied upon [the] likelihood" of "receiving § 212(c) relief" in "deciding whether to forgo their right to a trial." *Id.* at 325. By contrast, an alien who declined a plea offer and went to trial could not be said to have detrimentally relied on the availability of Section 212(c) relief. Unlike an alien who pleaded guilty to an aggravated felony at a time when such a plea did not render the alien ineligible for Section 212(c) relief, an alien who declined a plea offer and went to trial could not make a comparable claim that he made his decision in reliance on his eligibility to receive Section 212(c) relief and might have made a different decision if he had anticipated that conviction of an aggravated felony would render him ineligible for discretionary relief. Indeed, if the alien had anticipated that conviction of an aggravated felony would render him ineligible for discretionary relief, the only way to preserve eligibility would be to *exercise* the right to a trial (rather than to forgo it) in the hopes of obtaining an acquittal.

St. Cyr also emphasized that, not only did the alien receive a benefit in entering a guilty plea by preserving

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in order to retain eligibility for Section 212(c) relief under pre-IIRIRA and pre-AEDPA standards, see p. 2, *supra*, the court indicated that its application of *St. Cyr* to aliens who affirmatively declined a plea offer would apply even if the sentence contemplated by the rejected plea offer (as well as the sentence imposed after trial) was for a term of more than five years of imprisonment. See 373 F.3d at 495-496 & nn.15-16.

eligibility for Section 212(c) relief, but the government also received a benefit by obtaining a conviction without the need for a trial. 533 U.S. at 321-322. It is in that sense that the Court considered "[p]lea agreements [to] involve a *quid pro quo* between a criminal defendant and the government." *Id.* at 321. When an alien declines a plea agreement and elects to go to trial, however, there is no such *quid pro quo*. *St. Cyr* is inapplicable in such circumstances for that reason as well. For these reasons, *St. Cyr* does not apply to an alien who declined a plea agreement and was convicted of an aggravated felony after trial.

c. Although the result below appears to be inconsistent with the Third Circuit's decision in *Ponnapula*, there is no warrant for this Court to grant review. As a threshold matter, because the per curiam opinion below is unpublished and does not address or distinguish *Ponnapula*—or contain any discussion of the possible significance of the fact that petitioner declined a plea agreement before going to trial—it does not create controlling precedent in the Ninth Circuit that conflicts with *Ponnapula*. And for the same reasons, this case would in any event present a poor vehicle for resolving the issue addressed by *Ponnapula*.

Moreover, that issue is unlikely to recur with any substantial frequency. The issue addressed by *Ponnapula* could arise only in circumstances in which an alien (i) was convicted of an aggravated felony before IIRIRA; (ii) the conviction occurred after a trial rather than through a guilty plea; and (iii) the alien was offered and declined a plea agreement before going to trial. In that light, the *Ponnapula* court itself observed that "the effect of [its] overall holding is likely to be small." 373 F.3d at 496 n.16. Indeed, apart from the Third Circuit

in *Ponnapula*, no other court of appeals has addressed whether it could be significant that an alien declined a plea offer before being convicted of an aggravated felony at trial.

Even with respect to a case in which the *Ponnapula* issue was squarely raised—*i.e.*, where the alien was convicted of an aggravated felony before IIRIRA, the conviction occurred after trial rather than through a guilty plea, and the alien had declined a plea agreement before going to trial—the issue would be of no practical significance if the alien served a sentence of more than five years on his aggravated felony conviction. In that situation, the alien would be ineligible for Section 212(c) relief even under pre-IIRIRA and pre-AEDPA standards. See *Ponnapula*, 373 F.3d at 496 n.16 (explaining that "many aliens who are within the scope of this holding will nonetheless be statutorily ineligible for § 212(c) relief by reason of having served five years or more in prison"). Furthermore, *Ponnapula* was decided before this Court's decision last Term in *Fernandez-Vargas*, which emphasized the importance of a *quid pro quo* agreement in *St. Cyr*. See p. 6, *supra*. That intervening development undermines the reasoning of *Ponnapula*, which rested on the premise that a *quid pro quo* was not necessary. See *Ponnapula*, 373 F.3d at 488-489, 492 & n.9.

Finally, the issue is of diminishing prospective significance, as it only arises with respect to aliens who were convicted of an aggravated felony at trial before IIRIRA. See *ibid.* (explaining that "the class of aliens

affected by this ruling is constantly shrinking in size as the effective date of IIRIRA recedes into the past").[2]

2. Petitioner argues (Pet. 19-22) that, even if *St. Cyr* does not apply to an alien who declined a plea agreement and was convicted of an aggravated felony at trial, the repeal of Section 212(c) relief is retroactive as applied to him for another reason, *i.e.*, because he could have, but did not, apply "affirmatively" for Section 212(c) relief before he was placed in removal proceedings. There is no warrant for granting review of that claim.

As petitioner acknowledges (Pet. 20), only one court of appeals has held that the repeal of Section 212(c) relief is retroactive as applied to an alien who declined to apply affirmatively for Section 212(c) relief after his conviction but before being placed in removal proceedings. See *Restrepo* v. *McElroy*, 369 F.3d 627 (2d Cir.

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[2] The Tenth Circuit's decision in *Hem* v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006), which was issued after the petition was filed in this case, does not assist petitioner. In that case, the court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) does not apply to an alien "who proceeds to trial but forgoes his right to appeal when § 212(c) relief was potentially available." *Id.* at 1186. The alien had received a sentence of three years of imprisonment, but faced a maximum term of imprisonment of fifteen years. *Id.* at 1187. The court reasoned that an alien might decide to forgo an appeal if a successful appeal could ultimately result in imposition of a sentence of more than five years, such that the alien would thereby be deprived of eligibility for relief under former Section 212(c). *Id.* at 1199. Petitioner does not argue in the petition, and did not argue below, that the repeal of Section 212(c) relief is inapplicable to him on the ground that he declined to appeal his conviction to preserve his eligibility for discretionary relief. In fact, unlike the alien in *Hem*, petitioner was sentenced to more than five years of imprisonment, see p. 3, *supra*, and it therefore was unclear whether he would ultimately serve less than five years so as to retain eligibility for discretionary relief under the then-applicable standards, see p. 2, *supra*.

2004). No other court of appeals (including the court below), has addressed the issue. Moreover, petitioner did not raise the argument below. This Court ordinarily does not review issues that were neither pressed in nor passed upon by the court of appeals, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992), and there is no reason for a different result here.[3]

Finally, the Second Circuit in *Restrepo* did not hold that the repeal of Section 212(c) is inapplicable to *any* alien who could have applied affirmatively for Section 212(c) relief before being placed in removal proceedings but who did not do so. Rather, the court specifically declined to resolve whether an alien would be required to "make an *individualized* showing that he decided to forgo an opportunity to file for 212(c) relief in reliance on his ability to file at a later date," or "whether, instead, a *categorical* presumption of reliance by any alien who might have applied for 212(c) relief when it was available, but did not do so, is more appropriate." *Restrepo*, 369 F.3d at 639. Petitioner has not argued, let alone made any "individualized showing," that he decided to forgo applying affirmatively for Section 212(c)

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[3] Petitioner did not cite the Second Circuit's decision in *Restrepo* in his opening brief in the court of appeals, and he made no argument that the repeal of Section 212(c) is retroactive as applied to him because he could have, but did not, affirmatively apply for Section 212(c) relief before being placed in removal proceedings. Although petitioner later cited *Restrepo* in his *reply* brief in the court of appeals, Pet. C.A. Reply Br. 2-4, even then, petitioner did not rely on the decision for the proposition that the repeal of Section 212(c) would be retroactive as applied to an alien who did not affirmatively apply for relief before he was placed in removal proceedings. Petitioner made no such argument in his reply brief. Rather, petitioner relied on *Restrepo* for the general proposition that a *quid pro quo* exchange is not a precondition for concluding that the application of a statute would be retroactive.

relief in reliance on his ability to do so later if removal proceedings were commenced against him. Accordingly, it is not clear that *Restrepo* could benefit petitioner even if he had raised the argument below.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
BARRY J. PETTINATO
Attorneys

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[4] Petitioner also argues (Pet. 22-26) that applying the repeal of Section 212(c) relief to aliens who declined a plea agreement and were convicted of an aggravated felony at trial, while not applying the repeal to aliens who pleaded guilty to an aggravated felony, amounts to an irrational distinction in violation of the Equal Protection Clause. That claim, which was neither raised nor addressed below, lacks merit. Far from being an irrational distinction, the distinction, as explained above, see pp. 6-9, *supra*, follows from application of the considerations of settled expectations, reasonable reliance, and fair notice that inform this Court's inquiry into whether application of a statute would have a retroactive effect. See, *e.g.*, *Landgraf* v. *USI Film Prod.*, 511 U.S. 244, 270 (1994).

(2)

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Supreme Court of the United States

HERMAN APPEL,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

MARC VAN DER HOUT
Counsel of Record
ZACHARY NIGHTINGALE
BETH FEINBERG
VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE, LLP
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
(415) 981-3000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR THE PETITIONER

This Court should grant Petitioner's petition for writ of certiorari to resolve the growing and irreconcilable conflict among the circuits on the important issue of whether aliens who turned down plea offers, proceeded to trial, and were convicted at a time when they were statutorily eligible for relief from removal under former 8 U.S.C. § 1182(c), Immigration and Nationality Act ("INA") § 212(c) (known as "§ 212(c) relief") remain eligible to apply for that relief despite the law's subsequent repeal. Respondent has entirely failed to rebut Petitioner's arguments that he remains eligible for § 212(c) relief, and that no showing of reliance or a *quid pro quo* agreement is required in order to show impermissible retroactive effect under this Court's well-established retroactivity analysis.

1. Respondent's assertion that the issues raised in Petitioner's petition for writ of certiorari do not warrant this Court's review is without merit.[1] As detailed in the petition, there is an irreconcilable split among the circuits on an issue that has a far-reaching effect – application of

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[1] As a threshold matter, Respondent unjustifiably attempts to limit the scope of the question presented to only those aliens whose convictions by jury trial constituted *aggravated felonies*, rather than to all aliens whose convictions by jury trial rendered them removable prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). There is no cogent reason to so restrict the question presented, particularly in light of the fact that this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001) extends to *all* convictions attained by plea agreement for which aliens required (and were otherwise eligible for) § 212(c) relief. This Court should therefore consider the question presented as that originally stated in the petition.

this Court's holding in *St. Cyr* to aliens who turned down plea agreements and were convicted by jury trial prior to the enactment of AEDPA and IIRIRA. This split has become even more pronounced since this petition was filed. Since then, as Respondent acknowledges, the Tenth Circuit decided *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006) which, like the Third Circuit in *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004), extended *St. Cyr*'s holding to aliens who were convicted by jury trial in a case, like here, where the alien did not appeal the conviction. The Fifth Circuit ruled to the contrary earlier this year in *Hernandez-Castillo v. Moore*, 436 F.3d 516, 519-20 (5th Cir. 2006), *cert. denied*, ___ S.Ct. ___, 2006 WL 849672 (U.S. Oct. 2, 2006) (limiting *St. Cyr*'s holding to aliens convicted pursuant to plea agreements), further widening the split among the circuits on this issue.

a. Although Respondent attempts to use *Hernandez-Castillo* to support his position, and to distinguish the Tenth Circuit's holding in *Hem*, both decisions only support Petitioner's argument that the circuit split continues to become even more pronounced, and requires the Court's intervention to establish nationwide uniformity on this issue. In *Hernandez-Castillo*, the Fifth Circuit held that it was *not* impermissibly retroactive to apply the repeal of § 212(c) to aliens who were convicted by jury trial. 436 F.3d at 520. By contrast, in *Hem*, the Tenth Circuit held it *was* impermissibly retroactive to apply the repeal of § 212(c) relief to aliens who were convicted by jury trial and who gave up their right to appeal their conviction when such an appeal *could have* rendered them ineligible for § 212(c) relief. 458 F.3d at 1199. As the court in *Hem* held, it is impermissible to apply the repeal of § 212(c) to "a defendant, like Hem, [who] *proceeds to trial*, is

convicted, chooses not to pursue an appeal when that appeal could result in the loss of § 212(c) relief and, subsequently, loses the availability of § 212(c) relief following the Attorney General's decision to apply IIRIRA § 304(b) retroactively. . . ." *Id.* at 1200 (emphasis added).

In his opposition, Respondent attempts to argue that *Hem* "does not assist Petitioner" because the facts presented in that case were not exactly the same as those in the instant case. Brief for the Respondent in Opposition ("Res. Opp.") at 11 n.2. However, in reaching its holding, the *Hem* court itself remarked on the irreconcilable split among the circuits on the issue of what type of reliance on prior law, if any, is required in applying both the *Landgraf* retroactivity analysis,[2] and this Court's holding in *St. Cyr,* to aliens who were convicted by jury trial.[3] 458 F.3d at 1191. As the court in *Hem* noted, the Fourth Circuit has held that no reliance on the prior law is necessary in order to find that a new statute has an impermissible retroactive effect, *id.* at 1191, *citing Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004).[4] It held, in the alternative, consistent with the Third and Sixth Circuits, that if any level of reliance is required, it need only be objectively reasonable, rather than actual, reliance. *Id.*, *citing Ponnapula*, 373 F.3d 480 and *Thaqi v. Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004). By contrast, as the court in *Hem* noted, the

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[2] This refers to the two-step retroactivity test established by this Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), as discussed in Petition for Writ of Certiorari ("Cert. Pet.") at 9-10.

[3] The court in *Hem* also specifically noted that "St. Cyr left unanswered [this] key question." 458 F.3d at 1186.

[4] As the court in *Hem* noted, the Fourth Circuit prior to *Olatunji* had required subjective reliance on prior law in the context of § 212(c) relief. *Hem*, 458 F.3d at 1192 n.4, *citing Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002).

First, Second, and Eleventh Circuits have imposed an individual, subjective, reliance requirement onto the retroactivity analysis, *id.*, *citing, inter alia, Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002), *cert. denied*, 539 U.S. 926 (2003), *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2003), *cert. denied*, 540 U.S. 910 (2003), and *Brooks v. Ashcroft*, 283 F.3d 1268, 1274 (11th Cir. 2002), while the Seventh Circuit has gone even further requiring a showing of a *quid pro quo* agreement in order to establish that a new law has an impermissible retroactive effect, *id.*, *citing Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (per curiam). The Fifth and Ninth Circuits have also held that subjective reliance is required in order to find impermissible retroactive effect, *see Hernandez-Castillo v. Moore*, 436 F.3d 516, 519-20 (5th Cir. 2006); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002), *cert. denied*, 539 U.S. 902 (2003), while in its recent decision, the Tenth Circuit joined the team of circuits that requires only objectively reasonable reliance, *see Hem*, 458 F.3d at 1197.

Thus, of the ten circuits to weigh in on this issue to date, the current tally is: one for a *quid pro quo* requirement, five for actual subjective reliance, three for objectively reasonable reliance, and one for no showing of reliance required at all. This split has caused some circuits to hold that § 212(c) relief remains available to aliens who were convicted by jury trial prior to the law's repeal, while others have reached the opposite result. *See* Cert. Pet. at 12-13; *see also Hem*, 458 F.3d at 1200. Thus, contrary to Respondent's argument, it is clear that the circuits are deadlocked on this issue, and that uniformity in application of the *Landgraf* analysis to this class of aliens can only be reached through this Court's intervention.

b. Moreover, Respondent has clearly misinterpreted this Court's decision in *Fernandez-Vargas v. Gonzales*, 126 S.Ct. 2422 (2006) in arguing that the case supports imposing a *quid pro quo* requirement onto the § 212(c) retroactivity analysis. Res. Opp. at 10. In *Fernandez-Vargas*, this Court held that it was not impermissibly retroactive to apply a reinstatement of removal provision in IIRIRA (section 241(a)(5)) to aliens who had previously been removed from the United States, and who unlawfully reentered prior to IIRIRA's effective date. 126 S.Ct. at 2423. The Court's reasoning was based on the fact that the new law did not penalize the actual act of reentry, but rather created a removal process to be initiated *at any time* after reentry. *Id.* at 2432. As the Court held, it is "the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo. . . ." *Id.* at 2432.

Contrary to Respondent's assertion (at 10), the Court in *Fernandez-Vargas* did not "emphasize the importance" of the *quid pro quo* agreement in *St. Cyr*, but rather used that as an example of a single past act to which new legal consequences subsequently attached, as opposed to the petitioner's ongoing choice to remain in the country, both before and after the passage of the new law. *Id.* at 2433 ("[T]he branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts"). Here, as Petitioner's single past act of rejecting a plea agreement and proceeding to jury trial fits squarely within this Court's reasoning, *Fernandez-Vargas* clearly supports finding that it would be impermissibly retroactive to deny Petitioner eligibility to apply for § 212(c) relief. *See also Hem*, 458 F.3d at 1198-99 (finding *Fernandez-Vargas*

supports its application of "objectively reasonable reliance" standard).

c. Respondent's argument that this issue is "unlikely to recur with any substantial frequency" is entirely without merit. Res. Opp. at 9. As discussed above, just this year, the Fifth and the Tenth Circuits have considered this issue and have reached opposite conclusions. Furthermore, as discussed in the petition at 3-4, approximately 55,000 convictions are sustained through jury trial each year, indicating that the continuing availability of § 212(c) relief for aliens who turned down plea offers and were convicted by jury trial prior to the law's repeal has far-reaching effects on the immigrant population in the United States and on this nation's immigration laws. As Petitioner fits squarely within this class of aliens, his case presents an appropriate vehicle for this Court to resolve the irreconcilable conflict among the circuits on this issue.

2. Respondent also attempts to argue the merits of the case in its opposition, even though that would be better reserved for when and if certiorari is granted. Nonetheless, Respondent's arguments must be addressed as they grossly misconstrue this Court's retroactivity analysis by attempting to impose an actual reliance requirement, even though *Landgraf* and its progeny, make clear that reliance is not required in order to establish that a new law has an impermissible retroactive effect on prior conduct.

a. Respondent first erroneously argues that aliens who were convicted by jury trial prior to the repeal of § 212(c) are ineligible to apply for that relief because they cannot demonstrate an actual, subjective reliance on the state of the law at the time of conviction. Res. Opp. at 6-7.

Respondent fails to address Petitioner's argument that aliens (like himself) who *turn down plea agreements* and proceed to trial demonstrate the same reasonable reliance as the aliens in *St. Cyr* who opted to *accept* those plea agreements. *See* Cert. Pet. at 15-19. As the Tenth Circuit noted:

> *St. Cyr* addressed the question of retroactivity *as applied only to those in situations similar to St. Cyr himself* – aliens who have pled guilty to crimes who were later made deportable by IIRIRA. . . . The Court generalized to a category of affected aliens from the facts of the case before it. . . .

Hem, 458 F.3d at 1199 (emphasis added). *Hem* thus made clear that there must be an individualized analysis of whether the repeal of § 212(c) would have an impermissible retroactive effect with respect to the relevant class of aliens.

The *Hem* court first considered the "attenuated role reliance played in *Landgraf* [which] can . . . not be plausibly read to erect a reliance prerequisite to sustaining a retroactivity claim." *Id.* at 1193. The court then noted that reliance did not even factor into this Court's retroactivity analysis in *Hughes Aircraft Company v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997), and that only a reasonable reliance standard was applied to its retroactivity analysis in *Martin v. Hadix*, 527 U.S. 343 (1999). *Hem.* at 1194-95. The court further found that "*St. Cyr* leaves little doubt that the Supreme Court has never insisted upon actual reliance as a prerequisite to sustaining a retroactivity

claim." *Id.* at 1195.[5] The court thus rejected exactly the type of subjective reliance requirement that Respondent asks this Court to impose, remarking that "a requirement that a petitioner demonstrate that he *actually* relied on § 212(c) turns the historic presumption against retroactive application of statutes on its head." *Id.* at 1192 (emphasis in original).

Respondent further fails to recognize *Hem*'s insight that different classes of aliens may present different reasonable reliance interests that render application of § 212(c)'s repeal impermissible retroactive. In *Hem*, that class of aliens was those who were convicted by jury trial and decided to forego their right to appeal those convictions at a time when they were eligible for § 212(c) relief. *Id.* at 1199. In *Ponnapula*, that class of aliens was those, like Petitioner, who turned down plea agreements (which might have allowed them to avoid the later predicament of removability with no waiver) and were convicted by jury trial at a time when they were eligible for § 212(c) relief. 373 F.3d at 494-95. *See also* Cert. Pet. at 17-19. The Tenth Circuit in *Hem* has only reaffirmed that there are numerous points along the spectrum of criminal proceedings at which aliens may establish a reasonable reliance interest, such that it would be impermissibly retroactive to deprive those aliens (like Petitioner) of eligibility for § 212(c) relief.

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[5] As Petitioner argues more fully in his petition, the facts of *Landgraf* make clear that it is not necessary to demonstrate detrimental reliance in order to show impermissible retroactive effect, as it is implausible to suppose that at the time the relevant illegal acts of sexual harassment occurred, the perpetrator relied on the then-exiting provisions of the law providing for legal remedies.

b. Respondent also erroneously argues that the Second Circuit's decision in *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004) does not support Petitioner's claims. Res. Opp. at 12-13. However, as with *Ponnapula* and *Hem*, *Restrepo* sets up yet another point during criminal proceedings at which reliance on the law at the time *could reasonably* develop – at the point of forgoing filing an affirmative application for § 212(c) relief prior to the change in law. The court in *Restrepo* agreed that reliance may be established by the act of not affirmatively applying for § 212(c) relief, but did not definitively decide whether that reliance must be actual or reasonable – which is precisely why review by this Court is warranted.[6]

c. Finally, in attempting to rebut Petitioner's Equal Protection argument, Respondent conflates the *Landgraf* retroactivity analysis with the rational basis that the Constitution requires in order for the government to treat similarly situated persons differently. Res. Opp. at 13. As discussed at length in the petition, there is absolutely no rational basis for allowing aliens who accepted plea offers to retain eligibility to apply for § 212(c) relief, while denying that same eligibility to aliens who turned down those plea offers and proceeded to trial. Cert. Pet. at 22-26.

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[6] Inexplicably, Respondent suggests that Petitioner is barred from citing to *Restrepo* in his Petition for Writ of Certiorari because he cited it only in his Reply, but not in his Opening, brief. Respondent ignores the fact that *Restrepo* was not issued until April 1, 2004, after Petitioner's Opening brief was already filed.

CONCLUSION

For all the foregoing reasons, and for those presented in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

MARC VAN DER HOUT
Counsel of Record
ZACHARY NIGHTINGALE
BETH FEINBERG
VAN DER HOUT, BRIGAGLIANO &
NIGHTINGALE, LLP
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
(415) 981-3000

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